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GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade

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Long before the current crisis triggered by the recent United States initiatives in trade and monetary policy,¹ a crisis of quieter dimensions was taking shape in GATT legal affairs.² For some years now, the GATT's code of detailed substantive obligations has been in failing health. One source of the difficulty has simply been old age, for a number of the rules written in 1947 have become unresponsive to current attitudes and market conditions. A more basic problem, however, has been an increasing tendency among GATT participants to question the utility of *any* detailed substantive rules. Many have argued that the GATT would operate more effectively if it turned away from rule-oriented regulation and tried instead to influence govern-

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1. The current crisis was triggered by President Nixon's announcement on August 15, 1971, that the United States would float the dollar, impose a ten per cent surcharge on most imports, and consider legislation that would grant a ten per cent tax subsidy on purchases of United States-produced capital goods. The measures were taken in the context of a demand by the United States for a major realignment of world exchange rates, coupled with demands for revision of defense arrangements and for a seemingly unilateral reduction of trade barriers, the entire package to achieve a massive thirteen billion dollar improvement in the current United States balance of payments position. See N.Y. Times, Aug. 16, 1971, p. 14, col. 1 (city ed.) (text of President's announcement).

The measures have been reviewed in GATT, where a working party reportedly determined that the surcharge was improper under GATT rules, N.Y. Times, Sept. 12, 1971, at 13, col. 1.

2. GATT is an acronym for General Agreement on Tariffs and Trade, a multilateral agreement promulgated in 1947 which contains a comprehensive set of substantive obligations and procedures relating to international trade policy. Oct. 30, 1947, 61 Stat. pt. 5, at A11 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. The Agreement has been modified in several respects since 1947. The current authentic text is published in 4 GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [the series of volumes and supplements is hereinafter cited as GATT, BISD]. The acronym is also used to describe the institution which, though without formal United Nations status, has grown up to service the Agreement and to furnish a variety of organizational services in related areas. More often than not, the acronym is used to describe both Agreement and institution as a single entity.

ment trade policy by means of nondirective consultative procedures. As long as the GATT code seemed to be working, arguments of this kind were usually regarded as a healthy counterbalance to "legalistic" tendencies. As various rules have become outdated, however, these arguments have come to have a much more important effect on GATT regulatory practice, supporting a growing tendency to put the old rules aside and to operate without any such rules at all. The accumulation of these responses has gradually been forcing the GATT to abandon the kind of legal system represented by its detailed rules, and has raised the possibility that GATT itself might one day be abandoned in favor of another institution more in keeping with the current taste for non-directive consultations. A United States proposal in June of this year to establish a new forum for trade policy discussion under the aegis of the OECD made this latter possibility seem not at all remote.³

The current crisis has quite naturally pushed these questions of GATT legal structure into the background, for governments are now confronted with a challenge to the very premise of economic cooperation. If a major breakdown can be avoided, however, it will not be long before these earlier questions are returned to the agenda, for the one certain effect of the current crisis, once the dust settles, will be a greatly intensified search for ways of improving the structure and content of international economic institutions.⁴ Whatever happens to GATT itself in the subsequent reexamination, the issues raised by the

3. See N.Y. Times, June 7, 1971, at 1, col. 3 (city ed.). The OECD (Organization for Economic Cooperation and Development) is the successor to the Organization for European Economic Cooperation, the institution formed to administer the Marshall Plan and related programs. Its membership is presently confined to the nations of Europe and North America, and Japan. The OECD serves as a forum for study and discussion of a wide range of economic problems, and has been used in recent years as a developed country caucus on issues such as the proposal to grant tariff preferences to developing countries, discussed pp. 1348, 1360 *infra*.

As explained publicly, the United States proposal remains unclear as to the precise role envisioned for the OECD vis-à-vis GATT. It may be noted, however, that the proposal comes at a time of increasingly frequent public statements suggesting that GATT as it now stands is outdated. See, e.g., EUROPEAN COMMUNITY, May 1971, at 9 (speech by President of EEC Commission); STAFF OF SENATE COMM. ON FINANCE, 91ST CONG., 2D SESS., ANALYSIS OF CERTAIN ISSUES RAISED BY THE GENERAL AGREEMENT ON TARIFFS AND TRADE 3, 9-10 (Comm. Print 1970). A similar question is raised in a recent study of GATT by one of its most knowledgeable veterans. J. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT? 318-27 (1971).

4. Some evidence of this tendency is the recent release, without comment, of the recommendations of the President's Commission on International Trade and Investment. The recommendations, drafted before the present crisis, call for new and comprehensive negotiations on the subject matter of the General Agreement, recommending specifically an effort to develop new rules on matters such as export subsidies and government procurement preferences for domestic producers. See N.Y. Times, Sept. 14, 1971, at 24, col. 3 (city ed.) (text of summary).

long-standing debate over the role of GATT substantive rules will have to be confronted wherever international trade policy is considered.

The present article examines that earlier debate. It was written before the current crisis erupted. Upon reviewing it again in light of more recent events, I have concluded that, except for an eerie sense of tranquility, the analysis and recommendations seem as valid now as they did when written.⁵ The article is offered, therefore, as a pre-crisis examination of an issue that should occupy an important place in the post-crisis period.

The central problem to be discussed is the role, if any, that detailed substantive rules can play in current international trade policy. The particular focus or target of the article is the growing criticism of such rules mentioned above. Partly for ease of reference (but mainly, I confess, to weight the scales a little), I have chosen to characterize that criticism as though it were a proposal for an alternative institution, called GABB,⁶ that would operate without any substantive rules. The issue, of course, is not an all-or-nothing choice between GATT and GABB, for it is unlikely that either point of view would be carried to absolute extremes in practice. But the issue is of that general dimension. Unless governments decide, fairly soon, to make a major effort to save the old GATT code, the pressures of a changing world will leave no choice but to commit the major part of GATT's work to GABB-type procedures.

The article is divided into four parts. Part I examines the present debate over the utility of GATT substantive rules, focusing particularly on the analyses offered by Professors Dam and Jackson in their recent books on GATT. The remainder of the article represents an effort to carry that debate further. Part II seeks to examine in some detail the particular ways in which, assuming a certain minimal

5. The monetary adjustments which are likely to follow the present crisis will not change any of the major assumptions on which the article rests. I had assumed the existence of a minimally viable monetary structure as a background to the trade policy questions. The sudden international consensus that the dollar was overvalued prior to August 15 now shows that there were more problems than I had supposed in this regard. The effect of any adjustments, therefore, will be to support the original assumption. It might also be noted here that the observations made later in this article relating to the evident upswing of protectionism in the United States, *see* pp. 1351-52 *infra*, were based on reactions attributable, at least in part, to the pressures of monetary disequilibrium. I believe, however, that the problem of growing protectionism is based on more fundamental changes in the competitive relationship between the United States and other major economies, and that unless the outcome of monetary readjustment is inconceivably favorable to the United States the basic pressures will continue to exist.

6. The name GABB, for General Agreement on Better Bargaining, should not be confused with GAB, the International Monetary Fund's General Arrangements to Borrow, in *INTERNATIONAL MONETARY FUND (IMF), SELECTED DECISIONS OF THE EXECUTIVE DIRECTORS AND SELECTED DOCUMENTS* 56, 66 (3d issue 1965).

consensus, the presence of detailed substantive rules can influence government behavior in the area of international trade policy. Part III explores the conditions which have in fact prevailed in the GATT's legal experience to date, attempting to trace those factors which seem to account for its early successes and its more recent failings. Part IV then discusses, in light of this analysis, several proposals concerning the possible future revision of the GATT legal structure.

The article offers several conclusions, general and specific. As a general proposition, I believe that detailed substantive rules can exert a potentially important influence on the way that trade policy decisions are made, and that consequently there should be a bias in *favor* of trying to maintain such rules. In each specific context, however, there is the further question of whether a sufficient consensus exists to permit such rules to be written and supported. I would argue that the experience of the early GATT demonstrates that a fairly durable consensus is at least possible. Whether such a consensus exists today is a much closer question, one that can only be answered by an effort at renegotiation. I believe, however, that an examination of the particular substantive and political factors which account for the present malaise will show that there are grounds for attempting such a renegotiation, at least in the key area of developed country industrial trade. Finally, assuming this to be so, I believe several specific changes in the GATT's present legal structure would improve the chances of success if such a renegotiation were undertaken.

I. The Current Debate

The General Agreement on Tariffs and Trade was part of a larger postwar effort to restructure international trade along lines that would prevent a recurrence of the autarkic policies that had plagued the 1930s.⁷ Its legal form was greatly influenced by the lesson government officials had drawn from the repeated failures of the broadly-worded international agreements negotiated during the prewar period,

7. The text of the General Agreement was drawn from a draft of the Commercial Policy chapter of the Charter for an International Trade Organization, better known as the Havana Charter or ITO Charter. The ITO was to have been the twin of the International Monetary Fund, a specialized agency of the United Nations dealing with the non-monetary side of economic affairs—trade, economic development, commodity agreements, restrictive business practices and employment policy. For the final text of the ITO Charter, see U.N. Doc. E/Conf. 2/78 (1948), or ICITO/1/4 (1948). The ITO Charter was never ratified. On the reasons for failure, see W. DIEBOLD, *THE END OF THE ITO* (Princeton Essays in Int'l Finance, No. 16, 1952).

the pious hopes expressed in a thousand and one economic conferences that "a fair and equitable international distribution of commodities" would come into being⁸

This time, instead of pious hopes, the draftsmen set out to write detailed rules that would leave no doubt about the trade practices governments were expected to follow. The level of tariffs was to be negotiable and subject to legally binding commitments. Most other forms of trade restriction, to be identified in precise detail, would be prohibited, with exceptions to be circumscribed by carefully-drawn criteria. Though a good deal of compromise crept in, the final text of the agreement was basically faithful to this design.⁹

The current debate about the effectiveness of detailed substantive rules takes place, naturally enough, against the background of what has actually happened to the GATT code in practice. GATT legal history provides each side with a demonstration of its case. In the first decade, roughly 1948-58, the GATT code seemed to work reasonably well. The GATT developed a series of dispute-settlement tribunals, eventually a third-party Panel on Complaints, which succeeded in disposing of over fifteen cases during this period, full judicial opinions and all.¹⁰

8. Undersecretary of State Sumner Welles, objecting to a particularly flaccid draft of the Atlantic Charter's economic policy statement on the ground that it resembled too much the prewar agreements, quoted in R. GARDNER, *STERLING-DOLLAR DIPLOMACY* 43 (2d ed. 1969). See generally *id.* at 104; LEAGUE OF NATIONS, *COMMERCIAL POLICY IN THE INTERWAR YEARS: INTERNATIONAL PROPOSALS AND NATIONAL POLICIES* 162-64 (1942).

9. The textual complexity of the GATT code is legendary. Every commentator has a favorite demonstration, to wit:

Mr. BROWN [speaking of GATT Article XI]. Sir, this is boilerplate language which has come up through the years. And, as you know, they get encrusted in traditional form.

Senator MILLIKIN. If you just take it as a matter of grammar—

Mr. BROWN. Please don't do that, Senator.

Hearings on H.R. 1211 Before the Senate Finance Committee, 81st Cong., 1st Sess. 1219 (1949) (the "Brown-Millikin debate"). As the quotation indicates, the postwar agreements drew on considerable prewar drafting experience. Contrary to the appearance of the prewar multilateral agreements themselves, the multilateral conferences of the time had produced a good deal of detailed drafting that was simply never used. See, e.g., Recommendations of the Economic Committee Relating to Tariff Policy and MFN, LEAGUE OF NATIONS DOC. E.805.1935.II.B.1. See generally LEAGUE OF NATIONS, *supra* note 5, at 33-34, 38-40. The drafting was used in a number of bilateral trade agreements, and the GATT text drew heavily from them, particularly from the standard United States bilateral trade agreement. See W. A. BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 20-21 (1950).

10. The tribunal function evolved cautiously. At first, legal issues were resolved in plenary session by vote of the Contracting Parties themselves or by "rulings" from the Chair. Later, such disputes were referred to "working parties," ad hoc negotiating groups consisting of the interested parties and a few neutrals. Some early working parties experimented with third-party rulings, and eventually, in 1952, third-party "panels" were adopted formally as the dispute-settlement device. GATT Doc. W.7/20 (1952). See generally GATT Doc. L/392/Rev.1 (1955) (Secretariat analysis of Panel procedure).

In only one case during this period did the Contracting Parties refuse to accept the ruling of a tribunal. Appendix, Item A-17. Disagreement or grumbling by the losing party

(An Appendix to this article contains a table of all GATT complaints from 1948-1970.) Although in many areas GATT obligations were not prosecuted with quite such vigor, the rules continued to serve as a framework for community supervision in those areas as well. For example, formal "waivers" were generally required to excuse open noncompliance, and some of the waivers were as demanding in appearance as the General Agreement itself.¹¹

Since about 1960, the tone of GATT legal affairs has changed. One still encounters occasional charges that one member or another is violating the law, but etiquette now seems to dictate that such charges not be pressed beyond the consultation stage. The practice of requesting waivers when deviating from the Agreement has also become much less fashionable. The overall incidence of noncompliance has increased markedly, to the point where a number of the GATT's rules have now been written off as simply inoperative.¹²

GATT participants tend to react to these developments in two ways. Some feel that the demise of GATT "legalism" is regrettable, and that GATT must somehow return to the attitudes of the first decade if it is to function effectively. A somewhat larger group argues, to the contrary, that the present wave of "pragmatism" is actually the wisest and most realistic way to conduct international trade relations. The legalist-pragmatist debate has been part of the GATT landscape since the beginning, the sort of tension one would expect to see in any rule-oriented institution. As noted earlier, however, the significance of the debate has changed considerably in recent years. Once a matter of balancing "tendencies," the debate has become a matter of basic institutional design.

The legalist-pragmatist controversy has been examined in two recent books about GATT law, Kenneth W. Dam's broad-ranging study of

was not uncommon. In four cases the losing party indicated it would not "accept" the result, but in none of those cases was the end result significantly affected. Appendix, Items A-2, A-5, A-6, A-20.

The only early case in which a tribunal was unable to reach a decision was the second case involving Cuban Textile Restrictions. Appendix, Item A-4. Even after having established what was probably GATT's first third-party "panel," the working party was unable to resolve the factual dispute in issue.

More recently, a panel declined to rule on the legality of the EEC's variable levy system for agriculture. Appendix, Item A-24.

For a further discussion of the GATT disputes procedure, see pp. 1337-45, 1370-71 *infra*.

11. For a further discussion of waivers and other practices during this period, see pp. 1337-38 *infra*.

12. For further discussion of current practice, see pp. 1343-46 *infra*. An examination of the GATT cases listed in the Appendix, and particularly their dates, is also of some interest. For discussion of the key substantive areas threatened by breakdown, see pp. 1346-64 *infra*.

GATT law, institutions, and commercial policy problems,¹³ and John H. Jackson's longer and more systematic treatise covering all aspects of the GATT legal structure.¹⁴ Though neither Dam nor Jackson wishes to join one camp or the other, their analyses and criticisms of the debate offer several insights into the assumptions and concerns on which the opposing viewpoints rest.

Professor Dam is generally critical of the detailed code approach taken in drafting the General Agreement. His criticisms vary. Some are directed only to the substance of the rules. Others bear a strong resemblance to the more sweeping GABB-type arguments advanced by the current school of GATT pragmatists. Dam's opening chapter outlines the main theme from which both kinds of criticism seem to flow. He charges that the drafting of the General Agreement was dominated by a certain type of "legalism,"

an approach to the drafting of international agreements under which draftsmen attempt to foresee all of the problems that may arise in a particular area (such as, let us say, the elimination of quantitative restrictions) and to write down highly detailed rules in order to eliminate to the greatest extent possible any disputes, or even any doubts, about the rights and obligations of each agreeing party under all future circumstances.¹⁵

This legalism, he goes on to say, rested on a "naive" view of law, for it tended to view law as substance—substantive rules.

Law is not solely, or even primarily, a set of substantive rules. It is also a set of procedures, adapted to the subject matter and designed to resolve disputes that cannot be foreseen at the moment when those procedures are established. Perhaps more important than settling disputes, law viewed as procedures and process serves to identify the common interest in complex situations and to formulate short-term policies for the achievement of long-term objectives.

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Part of the history of GATT is in fact a movement away from the naive view of law that held sway for many years and toward an interest in procedures. The legalists found that substantive rules requiring the abolition of trade barriers did not make much

13. K. DAM, *THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970), reviewed by Ehrlich, 45 N.Y.U. L. REV. 955 (1970), and Fulda, 69 MICH. L. REV. 783 (1971).

14. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969), reviewed by Hudec, 5 J. WORLD TRADE L. 365 (1971), Evans, 71 COLUM. L. REV. 185 (1971) and Fulda, 69 MICH. L. REV. 783 (1971).

15. DAM, *supra* note 13, at 4.

difference, and the pragmatists found that good will and ingenuity could achieve little in the way of reducing trade barriers and promoting international trade unless those qualities were accompanied by procedures for identifying the underlying economic problems that made barriers inevitable, for promoting stated multilateral moves toward the liberalization of trade barriers where it was difficult for any one contracting party to move alone, and for providing governments with a mechanism or an excuse to do that which they wanted to do but were unable to do because of domestic pressure.¹⁶

Later portions of Dam's book develop both the narrower and broader criticisms of GATT "legalism" suggested in these opening observations. The narrower criticism emerges in the form of an argument that many of the GATT's present rules err in addressing themselves to form rather than substance—the level of a tariff, for example, rather than its real trade effects. Dam sometimes proposes new substantive rules, stated in terms of actual trade effects, to meet the problem.¹⁷ The broader criticism of substantive rules themselves comes out less clearly, the main thrust seeming to be a recurrent skepticism about the impact of such rules on government behavior. Thus, although Dam at one point concludes that substantive rules may be essential to third-party adjudication of trade disputes,¹⁸ he describes the GATT's growing aversion to such lawsuits as "the recognition by all contracting parties that legalism does not contribute to trade liberalization."¹⁹ On another occasion, Dam applauds the use of nondirective consultative procedures because they avoid "poisoning the diplomatic atmosphere through charges of illegality."²⁰ Dam's discussion of the Article XXIV rules on customs unions, perhaps the fullest treatment of this issue, points to

16. *Id.* at 4-5.

17. *E.g.*, *id.* at 214-21 (border tax adjustments) and 274-95 (regional economic arrangements). For other examples of the criticism, see *id.* at 58-61 (reciprocity in tariff negotiations) and 87-91 ("substantially equivalent" concessions); *cf. id.* at 296, 315 (quantitative restrictions). For further comment on this part of the criticism, see pp. 1374-76 *infra*.

18. DAM, *supra* note 13, at 360-62.

19. *Id.* at 356. Dam goes on to admit that there may also be some disadvantages with the negotiating approach, an approach which he terms "conciliation." When he returns to the disadvantages of "conciliation" a few pages later, however, the "conciliation" he speaks of at that point seems to be a form of third-party Panel adjudication without the aid of written rules. *Id.* at 360-62. Although he concludes that such adjudication is less workable than adjudication based on rules, he never does get back to the original question of negotiation versus adjudication as a dispute settlement device.

It might be added that while Dam is correct in pointing to the Panel's tendency to rest on written rules wherever possible, his discussion somewhat overstates the tendency by failing to take account at this point of the earlier nullification and impairment decisions which succeeded quite well in ruling on disputes without the aid of prior rules. See p. 1339 *infra*.

20. DAM, *supra* note 13, at 354.

the growing noncompliance with that provision as evidence that the "essential error" of the draftsmen was "their conception of a legal institution as largely a set of substantive prohibitions rather than as largely a set of procedures."²¹

If one were to press a little harder for an explanation of this broader skepticism, several factors might be noted. The surface "legalism" of the GATT's very detailed rules obviously contributes to this view, for it appears to identify substantive rules with a rather naive view of legal process. Recent GATT history also seems to provide important evidence that governments generally do not respond to such rules. The underlying explanation seems to run like this: Trade restrictions are the product of underlying economic problems, and they are "inevitable" as long as the problems are not solved. The mere existence of rules will not make these economic problems disappear, nor will rules promote the kind of discussion needed to understand and to solve them. The better answer, it seems, is full and open consultation about the economic problems themselves.

The very existence of Professor Jackson's decimal-numbered treatise suggests a more sympathetic view toward GATT substantive rules. Jackson's treatment of the legalist-pragmatist debate offers a thoughtful statement of the concerns which support that view. There are, Jackson admits, some advantages in attempting to solve problems by ad hoc negotiation. Negotiation is less likely to ruffle feathers; negotiated solutions avoid the win-lose discomfort of a lawsuit; and, of course, the bargained-for result is more likely to stick. Jackson doubts, however, that negotiation alone can serve as an adequate basis for GATT's work. He lists three main disadvantages. First, the outcome under the negotiating technique is much more responsive to economic or political muscle. Second, the ad hoc approach builds no precedents for future decisions. And third, Jackson argues, the ad hoc approach to trade problems is simply not manageable:

It is theoretically advantageous that particular international differences of opinion are seen in the context of the broader relationships involved, but there is a limit to this advantage. At some point the whole business becomes so complex that the human mind can no longer cope with it A simple problem of a breach of a particular GATT obligation . . . could produce discussion of a number of other facets of international economic relations, includ-

21. *Id.* at 291. Dam's final position on this "error" is somewhat unclear, for part of the solution he proposes looks like another set of substantive rules. *See id.* at 294, discussed p. 1333 *infra*.

ing inconsistencies with the GATT norms by the complaining country itself, other negotiations . . . going on at the same time between these parties and other parties, foreign aid promised or proposed between the parties, . . . political support in other bodies . . . , monetary and balance-of-payments problems between the disputants and the like. A desideratum of international techniques for dealing with problems that arise is to try to limit the complexity and scope of such problems so that they can be dealt with one by one. Legal norms, and compliance with them, can provide the framework—the woof and warp of international economic relations, so that particular problems that arise can be dealt with in relative isolation by judging them in the context of the legal norms associated with them. The other complicating factors . . . do not need to be analyzed in depth in every case. To put this another way, what is necessary in international economic relations is the development of procedures and techniques that will “chip off” bits and pieces of the amorphous complex totality of commercial relationships and find solutions to those chipped-off pieces so that they are not an issue in every new negotiation that occurs in the future.²²

Unfortunately, Jackson's analysis of the difficulties with the GABB approach does not really come to grips with the basic assertion on the other side. For, if it is true that governments do not, and perhaps cannot, respond to legal norms in this area, neither the problem of political muscle nor the inevitable complexity of negotiation is going to be cured by resort to a system of rules. Jackson obviously believes that legal obligations can have some impact on government behavior, but his assumptions in this respect are never stated clearly. He mentions the GATT's early legal experience, and seems to treat that experience as a basis for expecting that governments can be made to respond.²³ But little is said as to why or how such responsiveness was

22. JACKSON, *supra* note 14, at 766-67. Jackson also discusses the benefits and disadvantages of the secrecy which often attends negotiating procedures, a factor which is not usually part of the prospectus for GABB consultation procedures.

23. The perspective is implicit in the following account of GATT legal history which Jackson reports having received in private discussions:

[I]t has been suggested that the EEC debates were a turning point in the viewpoint of law in GATT. Up to that time, it can be argued, GATT was more responsive to legal arguments and to the idea of the importance of the substantive obligations in GATT. There were more frequent formal complaints in GATT and these complaints were more often processed with the use of a “panel,” which rendered a report that dealt with the legal arguments in great detail, and reflected the importance in which those arguments were held. Subsequent to the GATT examination of the EEC, there have been fewer formal complaints, and lately there has even been the hint that the complaint procedure has fallen into disfavor in GATT, at least among the larger nations. The failure of some of the 1955 changes in GATT's structure and obligations to come into effect also had its influence on the declining value placed upon the legal procedures and norms of GATT.

Id. at 759-60.

achieved, or what has gone wrong since then. What comments there are seem to focus on the force of "obligation" itself. Jackson observes, for example, that continued disobedience to GATT legal norms is bound to engender "disrespect for law."²⁴ He also attaches particular importance to maintaining a clear distinction between "norms of obligation" and "norms of aspiration," arguing in his concluding chapter that GATT law would be more effective if formal legal obligation were reserved for those rules as to which governments are able to guarantee full compliance.²⁵

The absence of a more direct answer to the pragmatist arguments is regrettable, for it leaves the issue open to a certain kind of oversimplification which very often afflicts the legalistic position. Those who oppose the present wave of GATT pragmatism are usually content to argue that the GATT substantive code can be made to work because it once did work. As to how it worked, and how it can be made to work again, the most common assumption is that the GATT legal system must have worked like any other legal system, and will do so again if only the citizenry will make up its mind to be law-abiding. Such arguments tend to reinforce the pragmatist criticism rather than dispel it, for they make it appear that the legal design being argued for is really as naïve as it appears.

II. The Function of Substantive Rules

In order to deal with the assertion that detailed substantive rules have no influence—or the wrong influence—on trade policy decisions, one must first try to separate two rather different grounds on which that assertion may rest. The first is the matter of consensus. It must be conceded that rules will not be worth much without some degree of community recognition as to their validity. Skepticism about the impact of such rules may, accordingly, reflect doubts about the existence of any underlying consensus. The second ground goes to something more basic. Much of the criticism of GATT rules seems to argue that, even if such a consensus were present, it would not do much good to reduce it to rules in advance, because the pressures which operate on government trade policy are simply too strong and too varied to be affected by such rules—in other words, that writing rules does not really add anything to the force of whatever community consensus exists. The greater

24. *Id.* at 757.

25. *Id.* at 761-62, 783-85.

the results promised for GABB diplomacy, the more the criticism of substantive rules tends to suggest this second argument.

Part II is addressed to the latter ground of criticism alone. It is necessary, therefore, to say something at the outset about the assumptions I shall make regarding consensus. The kind of liberal trade policy expressed by the GATT rules has never commanded universal approbation. The fact that governments were able to agree to these rules meant simply that the forces in each government favoring the rules were, on balance, stronger than those opposing. Support for the rules once written has been the product of a similar balance, a balance quite capable of shifting from case to case. About the most one can assume, therefore, is a situation in which trade policy officials within the various governments recognize and are prepared to defend the validity of the rules, and in which the overall balance of forces within the governments is at least open to such claims. One way of describing this degree of consensus would be to say that it is the measure of basic agreement which, at the time in question, would enable trade policy officials to negotiate the same rules on an *ad referendum* basis. While I recognize that there is a legitimate question as to whether such a consensus does in fact exist at the present time, I shall assume for the purpose of the analysis in Part II that it does.²⁶

The assertion that detailed substantive rules will have little or no influence in these circumstances usually proceeds from a bit of conventional wisdom about the politics of foreign trade. Liberal trade policy is a political orphan in most national governments. Even in countries where foreign trade occupies a much larger share of GNP than it does in the United States, the benefits of freer trade tend to be spread too thin for political effect when compared to the specific jobs and business profits threatened by increased imports. Although many of the pressures generated by this one-sided political situation can be overcome by aggressive executive leadership in the name of the larger public interest, political accountability makes it certain that governments will have to satisfy some of these pressures some of the time. Thus, no matter how reasonable a rule may seem at a given time, no government can ever guarantee its ability to comply for very long into the future. Because of this fact, it is argued, detailed "legal obligations" are simply utopian; one would do better to debate each case on the merits as it arises.

I believe this point of view ignores a number of very important functions that detailed rules can perform. My disagreement is not with the

26.. Part III, *infra*, discusses the question of whether such conditions do in fact exist.

observation that "legal obligation," as an independent force, seems to have relatively little impact on these situations. Nor do I quarrel with the general observation that most of the moral, economic or political forces which bring governments to the point of writing a code will continue to exist whether or not the code is actually written or signed. I would argue, however, that writing and signing such rules does contribute significantly to the conservation, organization and intensification of those forces in the day-to-day decision-making which is the real source of policy. Most of what I shall have to say about the function of GATT rules will concern their operation in this marginal—though, I believe, important—area.

My purpose in describing these functions is not to argue that GATT is "law" any more than GABB. I doubt that any meaningful distinction exists along these lines. The case for GATT rules is more pragmatic. It rests on the particular ways in which such rules increase the influence of the GATT point of view, and the particular need for those incremental advantages in the type of decision-making environment involved.

A. *The Draftsmen's Objectives*

The place to begin an inquiry about the function of GATT rules is to ask what the GATT draftsmen themselves were thinking when they wrote the rules. Professor Dam to the contrary, the draftsmen were not as naive as their iron-clad rules would suggest. The leading participants were all veteran trade policy officials who had lived many years in the land of political earthquakes.²⁷ Any illusions they might have had about postwar politics would have been quickly dispelled by the course of the negotiations themselves. Although there was a fairly solid consensus about the rules that ought to be written, no major government felt that it could promise any important changes in existing practice for the sake of those rules. Exceptions to the rules had to be carved out in almost every such case.²⁸

27. The legal design of the ITO Charter, *supra* note 7, from which the GATT was taken almost verbatim, was established in the joint United States-United Kingdom draft which served as the basis of negotiations. See U.S. DEPT OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION (Pub. No. 2598, Commercial Policy Series, No. 93, 1946). See generally note 7 *supra*. The principal architects of the United States position, men such as Harry Hawkins and Francis B. Sayre, came to the negotiations fresh from a decade of experience negotiating bilateral agreements under the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943 (1934), amending 46 Stat. 703 (1930). Their British counterparts has a similar background. See GARDNER, *supra* note 8, at 16, 103-04. See generally E. PENROSE, ECONOMIC PLANNING FOR THE PEACE (1953).

28. The GATT Articles containing the major exceptions, and the countries which led the fight for them, are:

The decision to write precise substantive rules in these circumstances can be explained, I believe, by a more careful examination of the function these rules were meant to serve. Two points about the draftsmen's substantive objectives should be noted. First, for the most part the draftsmen were not trying to legislate the removal of existing trade barriers. The commitments almost invariably represented one of two typical situations: (1) the government was not now violating the rule and negotiators were betting that future policy could be kept within bounds (the United States situation),²⁹ or (2) the government was now imposing extensive temporary trade controls due to the postwar balance of payments crisis, and negotiators were betting that the rule would be observed when "normal" policy was formulated in the future (the situation for most of Europe).³⁰ The rules were thus mainly an effort to help prevent bad things from happening.

Second, the substantive rules themselves were primarily intended to channel trade restriction into acceptable forms, rather than to legislate any particular ceiling on the *level* of restriction. The most pernicious forms of trade restriction (including discrimination) were prohibited outright, but the tariff remained as an instrument of policy that might be used to satisfy demands for protection. Although the draftsmen also hoped to negotiate legally binding reductions in the tariff over time,

- (a) Article I:2, permitting continuance of existing tariff preferences (United Kingdom and France);
- (b) Article IV, permitting quotas on cinema films (several European countries);
- (c) Article XI:2(c), permitting quotas needed to effectuate certain agricultural price support programs (United States);
- (d) Articles XII-XIV, permitting broad latitude in the use of quotas for balance of payments reasons (United Kingdom and France);
- (e) Article XVI, originally permitting virtually uncontrolled use of export subsidies (United States);
- (f) Article XIX, permitting quotas as well as tariff increases to counter injury to local producers (United States);
- (g) Article XXI, permitting restrictions for reasons of national security (United States).

The United States did agree to some rules requiring changes in existing legislation, chiefly GATT Article VII which would have required, *inter alia*, abolition of American Selling Price valuation. The United States Executive proposed the necessary legislation at one time, but without success. See *Hearings on H.R. 1555 Before the House Ways and Means Committee*, 82d Cong., 1st Sess. 2-30, 79, 612-20 (1951). Under the terms of the Protocol of Provisional Application, accession to GATT itself did not require that such inconsistent legislation be changed. See note 92 *infra*.

29. For example, the rule of GATT Article XI:2(c) requiring production controls as a condition of imposing agricultural quotas was accepted on the assumption that, although the relevant United States legislation provided for quotas without regard to production controls, the legislation could be administered in a way to limit its impact to cases in which production controls did exist. See GARDNER, *supra* note 8, at 374. For an account of what happened to these expectations, see Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 266-67 (1967).

30. See, e.g., K. KOCK, INTERNATIONAL TRADE POLICY AND THE GATT—1947-1967, at 57 (1969); C. WILCOX, A CHARTER FOR WORLD TRADE 199 (1949).

these latter obligations were explicitly made subject to certain escape valves—a right to suspend concessions immediately in the case of serious injury and a periodic right to withdraw concessions for any reason whatever.³¹ In short, the level of protection was to be determined by periodic negotiation, as governments were ready for it.³²

More important than either of these substantive limitations were the draftsmen's expectations regarding enforcement. The enforcement machinery was defined most clearly in the negotiations over the International Trade Organization (ITO), the United Nations specialized agency from whose "Charter" the GATT code was drawn. The ITO negotiations made it clear that there was to be no enforcement of the GATT/ITO rules beyond a formal ruling announcing the violation, plus, perhaps, some gentlemanly exhortation. The idea of punitive sanctions was considered and rejected, leaving the injured party only the right to "compensate" its injury by withdrawing commercially equal benefits in return. The possibility of issuing formal directives was likewise considered and rejected. Although the International Court of Justice was to have jurisdiction to issue legal rulings, it was decided after much debate that these rulings would take the form of advisory opinions to the ITO itself, thereby removing the possibility of an ICJ judgment against the guilty party. The ITO, in turn, was left with a deliberately ambiguous power to "request" compliance.³³

The policy that emerged was one of using legal obligations as instruments of diplomatic pressure. Legal obligations, and the rulings thereon, would define the desired result. They would, in addition, create some pressures of their own toward that result, principally that sort of exposed discomfiture which diplomats like to call "embarrassment." Finally, the obligations would tend to legitimize and sharpen all the nonlegal pressures which would have been there anyway. One of the delegations which had originally supported a more "legal" procedure summed it up this way in explaining the ICJ advisory opinion procedure:

31. GATT Articles XIX and XXVIII, respectively. Although Article XXVIII adjustments must be accompanied by negotiations looking toward the substitution of other concessions as a way of maintaining the overall level and balance of existing concessions, the making of such substitute concessions is not a legal requirement; affected governments may adjust the balance by withdrawing tariff concessions of their own.

32. This design assumed, of course, that tariffs would be sufficient to accommodate the demands for protection that would have to be accommodated, an assumption which has since proved overly optimistic in some areas. See pp. 1352-55 *infra*.

33. The final text of the ITO disputes procedure appears in ITO CHARTER, *supra* note 7, arts. 93-95. For a more extensive treatment of this negotiating history, see Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615, 621-31 (1970). See generally notes 7 and 27 *supra*.

The delegation of Belgium and Luxembourg agrees to make this concession, as it considers that an advisory opinion procedure will facilitate the settlement of disputes by sparing the political susceptibilities of states, which can subsequently take advantage of the light thrown on a case by public hearing and the opinion of the Court to arrive at a compromise among themselves by diplomatic means.

... [T]he Court's action in an advisory capacity should create an "atmosphere" which will encourage the parties to seek a solution to their dispute.³⁴

In his final chapter, Professor Jackson makes a useful distinction between two aspects of rule making: (1) the definition of an agreed normative standard, and (2) the commitment to abide by that norm.³⁵ The drafting history just described involved a splitting apart of these two aspects. Once it was recognized that governments were not in fact going to undertake a very firm commitment to the rules, the rules themselves became primarily a statement of agreed "norms."³⁶ By continuing to work for maximum precision of the rules, the draftsmen were saying that normative standards themselves were of value, and that even without an absolute commitment (or perhaps especially then),

34. U.N. Doc. E/PC/T/W/257, at 2 (1947). Secretary of State Acheson had this to say: The sanctions of this Organization are not the sanctions of force, or of power to direct action by member nations, or of the power to spend money But it has sanctions. Its sanctions stem from the voluntary agreement of its members to abide by certain rules, and include the power to bring up for open discussion and public scrutiny cases of failure to abide by that agreement, and the power to release members from their obligations under charter to another member which is found by the Organization to have failed to abide by its agreement.

Hearings on Membership and Participation by the United States in the ITO Before the House Committee on Foreign Affairs, 81st Cong., 2d Sess. 15 (1950).

35. JACKSON, *supra* note 14, at 783-85. For a discussion of Jackson's use of this distinction, see pp. 1372-73 *infra*.

36. The word "norm" may raise some questions. I believe the term is appropriate to describe both the rules a government makes for itself in this area and the GATT rules that governments make among themselves. As to the former, although trade policy issues typically present claims representing widely divergent values, the rules that are made in response to those claims are normally framed and justified in terms of what is right, and their administration is generally guided by the normative framework so established. As for GATT rules themselves, it is sometimes said that while the United States and United Kingdom may have had such a normative framework in mind when proposing the rules, the other governments which accepted the rules did so merely because they wanted the United States tariff concessions which came with them, and not out of any general conviction that the rules were right. The evidence usually offered in support of this view is the fact that the United States had to work very hard indeed to persuade the other governments (even the United Kingdom in many instances) to adopt the rules. I do not believe this is an accurate interpretation. Setting aside the developing countries—which were, I admit, in fundamental disagreement about the equity of the entire structure—I believe that the main resistance to the United States-United Kingdom design on the part of others came primarily from a desire to preserve autonomy. The proof is what happened afterward. The early GATT displayed a remarkable command of the spirit behind the rules, developing common law interpretations and additions to GATT law which demonstrated not only that the members of the community knew what was behind the rules, but also that they were prepared to accept that underlying consensus as the basis for authoritative action. See p. 1339 *infra*.

the more specific they were the better. That, I would argue, was the hypothesis behind the GATT rules.³⁷ To test it, we must look at the various decision-making processes the rules were meant to influence.

B. *The Role of Substantive Rules in National Decision-Making*

The following examination of trade policy decision-making at the national level deals only with the United States. Admittedly the structure of that process in the United States is not representative of GATT governments generally. I suggest, however, that the functions served by GATT rules in the United States decision-making process will very probably be found, *mutatis mutandis*, in other GATT governments as well, for both the interests involved and the political structure behind governmental processes appear to be substantially the same.³⁸ This larger claim is, of course, hypothesis. Hopefully, what is said here about the United States will offer one part of the comparative study needed to test it.

1. *The United States Executive*

Executive decisions on trade policy seldom appear "inevitable" to those who make them. The process of decision typically begins with claims on one side asking for as much as possible, countered by resistance of equally unbending character on the other. The results which eventually issue from the process are usually a form of equilibrium be-

37. It may be asked why the draftsmen used forms of legal obligation at all. The answer, I think, is that the momentum of past practice virtually forced them to accept the conventional form of an international agreement as a starting point. On the purely technical level, the United States Executive's authority to negotiate tariff reductions was tied to the formation of conventional agreements. On a more general level, governments did want some demonstration that the rules would be taken seriously, and, particularly in the light of past practice, any lesser form of commitment would have excited undue suspicions that such was not the case. Although legal obligation may have said too much in the circumstances, governments had in fact been able to live with similar overstatement in the case of prior bilateral agreements and were no doubt confident that they could continue to "manage" the GATT/ITO rules in the same way.

38. Parliamentary forms of government naturally reduce the sharp division between executive and legislative roles found in the United States. It has been my experience, however, that one tends to find virtually the same divisions in these governments between domestic and foreign ministries.

There are, of course, the few traditionally low-tariff countries in which commitment to liberal trade is a much more solid fixture in the overall political environment. In addition, the size and cost structure of the United States market, as well as the relatively greater capabilities of the United States foreign investment, tend to make United States business somewhat less interested in foreign trade than their foreign counterparts generally. Nevertheless, if one considers the trade policy behavior of the major GATT participants—the United States, the EEC, Japan, and countries such as Canada and Australia—in the recent Kennedy Round trade negotiations, the similarities in overall outlook toward foreign trade far outweigh, I think, the differences. Indeed, more than one GATT observer would argue that the major source of GATT initiative since the war has been the United States, and that the current malaise is due mainly to the loss of that leadership.

tween the contending forces, with dimensions of time and degree that may not be immediately apparent. Surprisingly few decisions issue directly from the Chief Executive.³⁹ Issues usually grope their way upward from initial skirmishes toward some official or group of officials with power to act. The decision itself is usually a rather protracted affair. Debate over the details is frequently as important, and as intense, as the contest over the general result. Once a decision is made, the losers will generally press for reconsideration or modification, and more likely than not a decision will be reopened once or twice for further important bargaining. Few things are ever "settled" for very long.⁴⁰

The influence of GATT substantive rules upon this ongoing tug-of-war comes down to their impact on the various actors whose collective weight moves, and holds, the result in one direction or another. Individual positions will be determined largely by the actor's appraisal of two central factors: first, the normative question of whether the local interests "deserve" the protection they are seeking, and second, the collateral "costs" that disappointed participants are likely to inflict on the decision-making official or his government. I would argue that

39. In the author's experience, even those issues which are bounced to the "highest" level are usually bounced right back unresolved, either in the form of a recommendation that the matter be "worked out among yourselves," or else, with a Delphic response broad enough to cover all important points of view.

40. Although it is manifestly impossible to document this generalization, an example may be helpful. During the winter of 1963-64, manufacturers of furniture using black walnut veneer petitioned the Secretary of Commerce to restrict exports of black walnut logs under the rather broadly defined authority granted by the Export Control Act of 1949, Pub. L. No. 81-11, ch. 11, §§ 1-12, 63 Stat. 7 (codified at 50 U.S.C. App. §§ 2021-32 (1964)) (now 50 U.S.C.A. App. §§ 2401-13 (Supp. 1971)). The demand was couched in terms of helping to conserve the supply of black walnut trees in the United States in the face of abnormally high foreign demand. A possible reason for the conservationist urge was the fact that foreign manufacturers, having developed a technology for significantly more efficient use of the logs, were bidding the price out of sight. Several government agencies objected to the proposal on the ground that GATT permitted such export controls only if the controls were part of a conservation program applicable equally to domestic consumption. The original proposal called for no mandatory limits on domestic consumption. Debate raged on several different fronts—the need to follow the GATT rule, the equity of the GATT rule, the conservation forecasts as to the supply of black walnut trees, and the effects of the price increase on United States business.

The GATT forces lost the first round, for export controls without domestic controls were imposed on February 14, 1964. Dep't of Commerce Press Release G 64-33 (Feb. 14, 1964). They succeeded in establishing the point about parallel controls, however, in the form of two concessions: (1) the controls would be imposed initially for only one year, as a "trial period," and (2) the controls would be continued only if the domestic industry succeeded in reducing domestic consumption by an arguably similar amount. At the end of the year, domestic consumption was found to have exceeded the voluntary target amount by thirty per cent, and, relying on this fact, the Secretary terminated the controls. Dep't of Commerce Press Release G 65-20 (Feb. 12, 1965).

The battle was not over. Legislators concerned about the outcome convened formal hearings, at which every issue was gone through again with a parade of experts on both sides. *Hearings on Export Controls on Black Walnut Logs Before the Senate Commerce Committee*, 89th Cong., 1st Sess., pt. 1 (1965). In response to the strong legislative criticism, the Secretary agreed to reconsider. Later in the year, the decision was reaffirmed, and even a second round of hearings did not move it this time. *See id.*, pt. 2, at 215.

the existence of detailed substantive rules can have an important influence on both of these calculations.

The role that substantive rules play in the normative side of trade policy debate is sometimes obscured by an inadequate understanding of what the normative issues are. Very frequently, questions of right and wrong are treated as though they were matters of economics—issues of comparative advantage and resource allocation that could be answered by economic analysis. If this were so, one might indeed wonder whether substantive rules perform any function at all. Energies would probably be better spent distributing a good economics textbook.

In fact, the normative standards of trade policy debate are not questions of economics. Whether cast as GATT rules or simply as “policy,” the value judgments which make up the GATT consensus have always been a compromise between the dictates of free trade economics and other social welfare values which require (or are thought to require) practices inconsistent with trade liberalization. There are a few GATT rules that do not involve such balancing. The classic example, of course, is Article XIX’s escape clause formula which allows governments unilaterally to abrogate tariff concessions and other obligations when imports cause “serious injury” to a domestic industry.⁴¹ A more esoteric example would be GATT Article IV allowing internal quantitative restrictions on cinema films. Although the exception could probably be justified solely on grounds that tariffs have no meaning in the cinema film trade, the justification is usually embellished with the quite serious contention that a national film industry (and, more recently, national television) has a role in preserving national cultural traditions which exempts it from the general pursuit of comparative advantage.⁴²

It is important to underscore both the complexity and the ultimately unverifiable character of these judgments. A particularly good demonstration of what is involved occurred recently in a debate before a congressional committee over the merits of GATT Article VII, the rule which requires that valuation of goods for the purpose of computing *ad valorem* customs duties be based on the market value of the imported goods themselves and not on the value of competing domestic products.⁴³ Opponents argued that the rule was inconsistent with the very

41. Essentially the same standards appear in the United States domestic legislation which is the counterpart of Article XIX. 19 U.S.C. §§ 1901-02 (1964).

42. See Jackson, *supra* note 14, at 293.

43. *Hearings on Tariff and Trade Proposals Before the House Ways and Means*

purpose of having tariffs, for a tariff meant to protect domestic producers from cheaper foreign goods should certainly not go *down* as the foreign good becomes cheaper. In addition, the opponents argued, the GATT rule actually works a trade distortion among competing imports, for the lower-priced of two competing imports will gain an extra price advantage by paying a smaller duty. A totally candid reply to these arguments would probably have gone something like this: In the judgment of trade policy experts, the administrative procedure of finding the competing domestic product and determining its price is a very cumbersome business, one which leaves the importer uncertain as to the duty until the goods arrive, and which, in addition, creates both commercially disruptive delays and opportunities for other subtle administrative inconveniences. These possible consequences, it would be argued, simply outweigh whatever theoretical problems the rule may present. The argument would add that the theoretical problems themselves are not serious. With regard to the potential discrimination between competing imports, proponents of the GATT position would contend that one simply cannot generalize about whether price advantage is a function of absolute or percentage differences. As for supposed inconsistency with the theory of tariff protection, the reply would simply offer a competing value judgment; once a tariff has been set, a relative increase in price *ought* to expose the domestic producer to stiffer international competition.

The proposition that international rules will have an appreciable influence on normative judgments of this kind is at once both obvious and impossible to document. To be sure, some officials will already have made up their minds on the basis of prior experience. In the usual controversy, however, there will be a significant number of officials who will not have had extensive experience—particularly higher ranking officials, those from “other departments,” and those new officials who continually enter the scene due to political change and the normal turnover of personnel. Even as to these officials, of course, it cannot be said that international rules are indispensable to persuasion, nor, indeed, that they are a guarantee against failure. But such rules do endow the GATT consensus with an objective authority which, given the absence of other anchors in this type of debate, should make that consensus more persuasive at every level of argument.

Two particularly important points of impact deserve to be men-

Committee, 90th Cong., 2d Sess. 4537-41 (1968), reprinted in C. FULDA & W. SCHWARTZ, *REGULATION OF INTERNATIONAL TRADE AND INVESTMENT* 233-36 (1970).

tioned. The first concerns the phenomenon of "digging in." Like anyone else, government officials have a tendency to hold positions once taken, for changes of position usually entail losses of prestige and authority that most officials would just as soon avoid. It is important, therefore, to "get to" officials as early as possible. International rules, and especially fairly precise rules, are an effective device for packaging and transmitting policy to operating officials in a manner that will affect initial responses. Even if such rules do not always cause officials to dig in on the GATT side, they will at least alert officials to the presence of the GATT position, in a way that will discourage premature commitment to the opposition.

The second point of impact involves the hearing accorded to the GATT point of view once debate is begun. Officials committed to the GATT position at present would probably continue to argue their convictions with equal vigor under GABB. The attention they would receive is another matter. Commentators writing about trade policy often make the mistake of assuming that their own, generally favorable view of pro-GATT officials is shared by the decision-making hierarchy as well. Not always so. In the eyes of many government officials, the pro-GATT official is also a self-interested participant—a single-minded internationalist whose only concern is to maintain foreign good will.⁴⁴ Officials who view the debate in these terms find it easy to dismiss GATT arguments as personal bias. The presence of international rules makes it more difficult.

This last phenomenon deserves to be underlined. I would argue that the existence of something like the GATT rules gives pro-GATT officials a much greater voice in all phases of internal decision-making. There is nothing sinister or undemocratic about this fact. It is one of

44. During the late 1940s, when Congress was reviewing the GATT/ITO negotiations, the Executive was asked to submit detailed biographies of every member of the United States negotiating team. See, e.g., *Hearings on H.R. 6566 Before the Senate Finance Committee*, 80th Cong., 2d Sess. 60-76 (1948). Complaints that United States negotiators invariably get the worst of every trade bargain are as commonplace as assurances that the critic has always been in favor of free trade. See, e.g., *Hearings on Tariff and Trade Proposals Before the House Ways and Means Committee*, 91st Cong., 2d Sess. 564 (1970). In drafting the Trade Expansion Act of 1962, these concerns were serious enough to raise a demand that responsibility for the contemplated trade negotiations be shifted from the State Department to the Commerce Department, a demand which had to be met by assigning responsibility to a new White House office situated at least on an organizational chart, somewhere between the two. 19 U.S.C. § 1871 (1964).

The distinctive colorations ascribed by Congress to the various Executive Departments tend to be expressed in inter-agency relations as well. As any State Department trade policy official will testify, one of the most taxing assignment diplomats face is to persuade other Executive Departments to give discretion to State Department officials in the field. As in the case of the Executive-Congress relationship, see pp. 1325-26 *infra*, differences in institutional perspective tend to be magnified in practice by a saints-and-sinners role perception into which most participants fall sooner or later.

the natural and intended consequences of writing international rules, part of the contract a national government makes with itself and with others when it agrees to put some aspect of its policy under this sort of surveillance. Whether intended or not, GABB would withdraw that delegation of power.

Substantive rules can affect in a variety of ways the "cost" calculations which make up the other half of trade policy decisions. Though the particular points of impact are quite disparate, the function of rules in each case is basically the same. It involves another kind of normative persuasion, something which might be called a legitimizing function. Even if opponents or neutrals cannot be persuaded that the GATT standards are "right," rules can still be of considerable value in identifying those standards as an objective and principled basis for action. This claim of legitimacy, in turn, can very often influence the official's perception of outside pressures, and the way he responds to them.

Perhaps the most important cost calculation affected in this manner is the official's concern for the general climate of cooperation. Every decision-maker tends to calculate the consequences of his actions upon the future behavior of others. Normally, he will think not only of immediate reactions, such as direct retaliation, but will also consider the impact of his decision on the long-range attitudes which induce governments to tolerate some degree of domestic "hurt" in the expectation of similar consideration in return. A code of substantive rules is one way to institutionalize these concerns, one in which the desired calculations will appear in the form of a general concern to preserve the integrity of whatever legal system is involved.⁴⁵ To understand the function that rules perform in making these calculations, however, one has to ask what would happen when the same calculations are made under GABB.

The pragmatist viewpoint would argue that governments can identify the desired level of mutual self-restraint through ad hoc consultation procedures, provided they make a genuine effort to explore issues fully and with candor. The proviso considerably oversimplifies the process of trade policy decisions. In the first place, candor is not that easy to come by. It is all but impossible to obtain agreement within

45. Although the same might be said of every function identified in this section, it is particularly necessary here to note that the working of a legal system in this regard depends on its representing at least a rough consensus among governments. One need not insist upon complete accord as to the equity of each and every rule, but there must be a shared sense that the rules as a whole are at least a satisfactory framework over the long run. As noted earlier, Part II assumes the existence of such a consensus; Parts III and IV will take up the problem of maintaining it in practice.

a national government on an *initial* position which does not press for as much as possible from the other side.⁴⁶ As a result, consultations will usually begin with both sides playing from more-or-less closed hands while diplomats begin the slow process of identifying each other's "essential" positions—positions which the home governments may not even begin to think about seriously until the first impasse. To expect officials to identify the likely impact of a decision on the basis of such exchanges is asking quite a lot, particularly when those officials are being hounded by much more immediate domestic pressures on the other side. Lacking any accepted standards calling for more, there is a real danger that officials will recognize only the most evident expectations of self-restraint, those which involve some immediate threat to the maintenance of minimum order.

In the second place, the fact that a matter is settled by ad hoc consultations will not necessarily mean that its consequences are mutually accepted. Most things are settled somehow. The critical problem is to have some way of keeping accounts for the future. Absent some agreed measure of the result, it is quite possible that each side will walk away believing that it has a "credit" owing from the other side because of concessions made. Attempts to spend such credits in the future will only confuse everyone's calculations still further.⁴⁷

46. See note 44 *supra*.

47. An example of this sort of miscalculation occurred recently in connection with the United States-Canadian Agreement Concerning Automotive Products, Jan. 16, 1965, 17 U.S.T. 1372, T.I.A.S. No. 6093. In order to solve certain business and political problems concerning North American auto production, the United States agreed as part of a larger agreement to grant duty-free entry to auto products from Canada but not from other countries, a violation of GATT Article I. Although the GATT problem caused some concern, the problem was put to one side fairly early in the negotiations on the assumption that the commercial effects of the discrimination would not really trouble other governments and that there would be no serious opposition in principle to granting the United States a GATT waiver permitting such discrimination. This calculation was based in part on the ground that GATT had recently indulged several other cases of ad hoc discrimination, particularly in the case of the EEC, which to United States officials had involved considerably greater departure from basic GATT policy. The agreement was negotiated, of course, before any real test of foreign reaction could be made.

When the test came, the expectations proved wrong. Although the waiver was eventually granted, GATT, 14th Supp. BISD 37 (1966), it came only after a great deal of criticism from governments which saw no parallel to earlier situations at all. See, e.g., GATT, 13th Supp. BISD 112 (1965). The waiver is still regarded by many GATT participants as a conspicuous breach of faith, to the continued consternation of many United States officials.

What happened, of course, was that the numerous departures from Article I during this period had left each government the judge of which departures were reasonable and which were not. EEC officials, for example, generally take the position that they have achieved a laudatory degree of trade liberalization in the face of the very difficult political problems which economic integration entails. Other governments usually take the same view of their own actions. Although the GATT community as a whole will usually "settle" the matter by going along with these various exceptions in one way or another, the Auto Parts waiver shows that the underlying normative accounting is not always shared.

In short, there is good reason to fear that GABB's case-by-case approach will invite a combination of wishful thinking, self-justification and eventual suspicion which will obscure any long-range calculations as to mutual expectations of self-restraint. The participants are simply too clumsy, their perspectives too diverse, and the benefits too remote. Rules do not guarantee that such calculations will be made. But rules, or some other source of external standards, would seem to be needed to frame the calculation in manageable terms.

A second, more immediate cost calculation that can be influenced by substantive rules is the possibility of direct economic retaliation. Threats of retaliation are fairly common in GATT circles, and the real thing, although rare, is certainly not unknown.⁴⁸ The effect of such

48. The provisions of the GATT which allow countermeasures, *e.g.*, Articles XIX, XXIII and XXVIII, are all framed in terms of "compensation" rather than punitive sanction. Nevertheless, the fact that most demands for compensation are satisfied by the offending party's grant of alternative concessions has led to a general tendency to view "compensatory" increases of trade barriers as a symbolic form of punishment. The recognition that retaliation usually hurts the retaliating country more than it helps it adds to this view. Retaliation is thus usually reserved for action perceived to be conspicuously "wrong" in some sense, and tends to be primarily didactic in purpose. For a discussion of the rather artistic way in which the GATT/ITO draftsmen dealt with the issue of sanction versus compensation, see Hudec, *supra* note 33, at 625-27.

I have found three major instances of retaliation in the GATT records. The first was a discriminatory quota on United States exports of wheat flour imposed by the Netherlands from 1953 to 1959 under Article XXIII, in response to admittedly illegal United States quotas on dairy products. *See* Appendix, Item A-10. Interestingly, the Netherlands never imposed the authorized quota restriction in full; United States sales exceeded the quota limit by over twenty per cent in five of the seven years, and for the first four years the United States retained its share of the total import market. *See* COMMONWEALTH ECONOMIC COMMISSION, GRAIN TRADE (1953-61 eds.); INTERNATIONAL WHEAT COUNCIL, TRADE IN WHEAT FLOUR 27 (Sec't. Paper No. 5, 1965).

The second major case was a decision by the EEC in 1962 to retaliate under Article XIX:3 rather than accept compensation for a U.S. escape clause action on carpets and glass products. GATT Doc. L/1803 (1962). Though no claim of legal violation was made, EEC officials regarded the action as unjustified and wished to make it clear that such action was not acceptable. *See* J. EVANS, *supra* note 3, at 167; E. PREGG, *TRADERS AND DIPLOMATS* 53 n.20 (1970).

The third major case was the United States decision in 1963 to retaliate under Article XXVIII: 1 for the EEC's withdrawal of member country tariff concessions on poultry. Appendix, Item A-26. The EEC action was legal, but the protective measures which replaced the binding (the EEC variable levy) were, although perhaps technically legal, certainly against the spirit of GATT policy. The United States could have accepted equivalent compensation on other products, but chose to reject the offer as a way of protesting the poultry restrictions and the similar direction of the EEC's Common Agricultural Policy in general.

There were two other relatively minor cases. In 1952 Turkey retaliated in a response to a United States escape clause action on dried figs; though Article XIX:3 does not require a finding of legal violation, the Turkish government had in fact claimed that the United States action violated GATT Article XIX conditions. *See* Appendix, Item B-8. The other case was an Article XIX withdrawal by Belgium, also in 1952, in response to a United States escape clause action on fur felt hat bodies, still another case in which a charge of legal violation lurked in the background. *See* Appendix, Item A-9.

The fact that three of the five actions involved the United States escape clause may be attributable in part to the fact that this United States-sponsored exception had been a serious cause of concern to other governments from the beginning, and was thus a natural object of the didactic impulse. *See* W. A. BROWN, *supra* note 9, at 89-90. Perhaps the same lesson can be drawn from the fact that all five actions have been aimed at superpowers.

threats will vary according to the way that they are perceived. Unless the recipient is persuaded that economic retaliation is justified, the threats may be perceived as bare power tactics and thus generate greater intransigence than before. Agreed substantive rules can perform an important function here, "chipping off," to use Jackson's term, the underlying question of whether the reaction is fair or appropriate. The legal justification will affect not only the reaction of the decision-making officials themselves, but also their ability to use such threats as a justification to others. At some point, indeed, the decision-making official may well find himself arguing the rules more vigorously than foreign governments.⁴⁹

A third cost-related function that substantive rules can sometimes serve is their role in justifying difficult decisions. This function arises when an official concludes that he would like to oppose a certain demand. One of the costs he must bear in taking that position is the necessity of explaining his opposition to the proponents and to their Congressmen. Explanations such as "Your hurt is not serious enough" or "Other interests are more important" tend to make the costs fairly high—either violent anger, or, the next worse thing, hour upon hour of rehashing the facts and rearguing the values. An answer in terms of the need to comply with international rules helps to avoid these consequences. While such answers do not necessarily dissuade further effort, they at least offer the official a politically tenable basis for stalemate.⁵⁰ Such excuses are particularly useful in the case of the casual

Threats of retaliation are not employed loosely, but they are quite common when governments resist correcting legal violations. In the United States dairy products matter mentioned above, for example, although only the Netherlands actually retaliated, the threat was also made by New Zealand, Canada, Norway, Australia and France. GATT Docs. CP.6/SR.10 (1951), SR.7/10 (1952). These threats were emphasized by the Executive officials before the Congress, even to the point of mentioning specific products that might be affected. *Hearings on the Defense Production Act Amendments of 1951 Before the Senate Committee on Banking and Currency*, 82nd Cong., 1st Sess., pt. 4, at 2947-51 (1951).

49. Officials always seem to think it worthwhile to invoke such justifications when they speak of these threats. Consider, for example, the form (if not the somewhat dated substance) of the following statement in a presidential message to the Congress:

I reject this argument [for increased trade restrictions] not only because I believe in the principle of freer trade, but also for a very simple pragmatic reason: Any reduction in our imports produced by U.S. restrictions not accepted by our trading partners would invite foreign reactions against our own exports—all quite legally. Address by President Nixon to Congress, Nov. 18, 1969, *United States Trade Policy*, 5 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1617, 1618 (1969).

50. The former Director General of GATT, Sir Eric Wyndham-White, would often tell visitors the story of the government official who once called upon him with a private industry representative in tow. The official asked Sir Eric if a certain trade restriction then being advocated by the industry representative would violate GATT. There being some room for argument on the issue, the Director General gave a "balanced" legal opinion. The government official later confessed some annoyance about the performance, explaining that all the way to Geneva he had been telling the industry representative that the

or unwilling supporter—the Congressman or party official making a routine representation on behalf of a constituent. Legal impossibility, often much overstated, removes pressure from the token supporter, and thus from the decision-making official himself.

The word “excuse” gives too little credit to this phenomenon. The possibility of a tenable stance may well be an important influence on the decision itself. It affects not only the decision-maker’s cost calculations, but also the number of people around him who might otherwise feel compelled to press for, or vote for, the opposite result. In addition, the justification helps to sustain continued and vigorous presentation of one’s views. For Executive officials particularly, there is a limit beyond which advocacy of purely personal views may be considered an abuse of one’s office. Concern for international rules, rightly, has more leeway.

A final cost-related function has to do with the point made earlier about momentum and “digging in.” Contrary to popular belief, the forces which gather behind any particular proposal for trade restrictions are not a fixed or inevitable quantity. A good deal depends on the way the original proposal is handled. If the proponents can be persuaded at the outset that success is quite doubtful, they will in many cases accept the fact and turn their energies elsewhere. This result is not as unlikely as it may seem, for in a substantial number of cases foreign competition is only a part—very often just a small part—of the business difficulties behind the claim for protection. But, on the other hand, if government opposition is slow to mount or is not particularly convincing at the outset, the forces behind the proposal are likely to grow. The expectation of success will draw forth the investment of additional time and effort, and perhaps new allies as well. And, needless to say, the more the investment grows, the greater will be the subsequent efforts to save it.

The function of international rules in connection with this final point should be fairly obvious. Some resistance from government officials is expected, and initially negative responses are discounted accordingly. Knowledge that the government will be required to breach international rules is a good deal more discouraging. The self-screening

proposal was impossible because it violated GATT, and that Sir Eric’s answer had now made it much more difficult to oppose the measure.

Professor Dam mentions this phenomenon in the passage quoted earlier, p. 1306 *supra*, though for some reason he makes it seem that the phenomenon belongs to “procedures” rather than “rules.”

of protectionist demands which such discouragement performs may well be one of the most important functions international rules perform.

2. *The United States Congress*

The role of GATT substantive rules in decisions by the United States Congress can be dealt with rather briefly. It will be evident, of course, that individual Congressmen can be influenced by GATT rules in all of the ways already discussed. The Congress as a whole, however, plays an institutional role in trade policy-making quite different from that of the Executive. It is that larger role I wish to discuss here.

The Congress tends to act more favorably toward requests for protection than does the Executive. The conventional explanation of this difference is that legislators are closer politically to the local interests seeking protection and are less immediately involved with the day-to-day demands of foreign relations. It is difficult to determine just how widely basic attitudes differ, for Congress and the Executive have developed a form of role playing which certainly exaggerates the difference. According to the common stereotype, Executive officials appear to the Congress as ultrasensitive diplomats ready to pay any price for international good will, while legislators are seen by the Executive as unthinking captives of medieval mercantilism. Role sometimes merges into reality, for the more one side treats the other side as if the stereotype were true, the more its own behavior tends to conform to the opposing caricature. It must be noted, however, that this adversary process also serves as a convenient political device for both Congress and the Executive, enabling each to avoid some of the responsibility for compromises which both may know to be necessary. If the Executive should ever stop fighting for liberal trade principles, it very much remains to be seen whether the Congress would do everything it says it wants to do.⁵¹

51. It can be argued that exactly this situation arose recently in connection with the Nixon Administration's efforts to secure voluntary restraints on textile imports. A bill designed to strengthen the Executive's hand in negotiations was introduced by Chairman Mills of the House Ways and Means Committee. It provided for more stringent quotas by law if a voluntary accord could not be reached. The bill mushroomed into an omnibus package containing a host of other restrictions which would have marked a sharp turnabout in United States trade policy. For the most recent version, see H.R. 20, 92nd Cong., 1st Sess. (1971), discussed at length in the Note which appears in this same issue, *infra* p. 1418. Although the Japanese textile industry finally offered to accept voluntary restraints, the Administration rejected the terms of the Japanese proposal as inadequate and seemed to be content to let the matter ride, even though passage of the omnibus bill in the Ninety-second Congress was rapidly becoming a certainty. The game of Russian roulette proved too much for Chairman Mills. Mills opened his own negotiations with

In accordance with its role, the Congress has generally maintained a certain independence from the international commitments represented by membership in GATT, viewing itself more as an umpire than a participant in the contest between GATT and local interests. Congress has never formally ratified the General Agreement.⁵² Although Congress has given the Executive the occasional negotiating authority and funds needed to support U.S. participation in GATT programs, it has almost always done so in a way which has carefully limited Congressional involvement.⁵³ In day-to-day affairs, Congress tends to treat GATT rules as the ward of the Executive, seldom if ever raising GATT questions on its own motion.

The first principle of Executive strategy is to keep Congress as far away as possible from all trade issues. When pressures for legislative action become serious, the Executive will very frequently make a partial concession on its own, hoping to avert something worse from Congress.⁵⁴ GATT rules sometimes serve to justify the Executive's not going further.

the Japanese industry, secured agreement on voluntary restraints less restrictive than those demanded by the Administration, and then announced that the "unilateral" Japanese action had removed the need for the legislation as a whole. Later reports indicate that Chairman Mills is now working on the major textile exporters. *See* N.Y. Times, March 9, 1971, at 47, col. 1 (city ed.); *id.* at col. 2; *id.*, March 10, 1971, at 59, col. 3 (city ed.); *id.*, June 16, 1971, at 61, col. 5 (city ed.).

Author's note: The final chapter in this story was a renewed campaign by the President to upset this accommodation on the ground that it was too generous. Under a threat of non-legislative quotas, Japan and the other major Asian exporters recently accepted the more restrictive "voluntary" limits sought by the administration. N.Y. Times, Oct. 16, 1971, at 1, col. 5 (city ed.).

52. The General Agreement was presented to the Congress as a trade agreement which, under the authority of the Reciprocal Trade Agreements Act, *supra* note 27, could be entered into by the President alone. For a detailed study of this proposition and its domestic law effects, see Jackson, *supra* note 29.

53. The recently concluded Kennedy Round trade negotiations were the sixth "round" of tariff negotiations under GATT. In each the United States was equipped with legislative authority to negotiate. From 1951 until 1962, however, each legislative authorization carried the statement that:

The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade.

62 Stat. 72 (1951). *See generally*, Jackson, *supra* note 29, at 267-68 and Appendix D. The 1962 legislation said nothing.

The omnibus trade legislation currently pending before the Congress (and unlikely to pass) contains the first line authorization for United States GATT expenses. H.R. 20, 92d Cong., 1st Sess., ch. 3, § 321 (1971). Previous funding has been accomplished by treating GATT as a nonrecurring international conference under the State Department's "International Conferences" appropriation. *See* Jackson, *supra* note 29, at 271.

54. Almost every proposal made to the Executive, of course, has the possibility of legislation lurking behind it, particularly if the proponents know what they are doing. A recent example illustrates the way things are usually handled. Beginning sometime in 1964, several American industries began to advocate revision of the United States anti-dumping laws to make them more effective (some would have said "restrictive"). Legislation was introduced. For the fully developed text, see S. 2045, 89th Cong., 1st Sess. (1965). To head off action on the bills, the Treasury Department issued new regulations which, while also meeting some of the importer's complaints, were primarily designed to disarm

When legislative debate on trade policy occurs, it tends to focus on the bread-and-butter issues—the immediate impact on business and workers. Executive intervention tends to address the same criteria. The main argument against trade-restricting measures is invariably that damage to local interests is either insubstantial or otherwise remediable, coupled with an appeal to consider the economic harm that protectionist measures will cause for export industries.⁵⁵ GATT obligations are often invoked to sustain the credibility and legitimacy of foreign retaliation, but that is usually the extent of their function.

On the surface, therefore, the tone of Congressional decision-making would probably not be significantly different under GABB. Moreover, against this larger institutional background, it would be difficult to argue that the direct impact of GATT rules on individual Congressmen is all that significant. The main difference in Congressional decision-making, I think, would be in the quality of Executive par-

the legislative effort by meeting some of its most persuasive objections to existing practice. 29 Fed. Reg. 16320 (1964). The move succeeded. Shortly thereafter, the Executive negotiated an international agreement, the so-called Antidumping Code, which required a liberalization of certain United States administrative criteria and procedures. Agreement on Implementation of Article VI, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431, reprinted separately as Sales No.: GATT/1969-5. The text of the Code bears every indication of having been negotiated to limit American commitments to those not requiring new legislation, and the Executive proceeded to issue new Treasury regulations on that theory. 19 C.F.R. § 153.1-.64 (1970); see Anthony, *The American Response to Dumping from Capitalist and Socialist Economies*, 54 CORNELL L. REV. 159, 186-89 (1969). The Executive's tightrope act received generally sour reviews from the Congress, and legislation was introduced to prevent application of the Code by the Tariff Commission. The final text, 82 Stat. 1347 (1968), was the product of a vigorous contest; the result was inconclusive, leaving the question ultimately to a case-by-case appraisal by the Tariff Commission. See generally Pintos & Murphy, *Congress Dumps the International Antidumping Code*, 18 CATHOLIC U. L. REV. 180 (1968).

For a discussion of a similar response to Congressional pressures concerning the escape clause, see Metzger, *The Escape Clause and Adjustment Assistance*, 2 LAW AND POLICY IN INT'L BUS. 352 (1970).

55. For example, in the debate over the American dairy products restrictions, see note 48 *supra*, even though the GATT had declared the restrictions to be in violation of GATT in the most emphatic terms possible, see 2 GATT, BISD 16 (1951), Executive witnesses seeking repeal of the measures barely even mentioned the legal violation itself, concentrating instead on the threat of retaliation and the availability of less drastic relief. See, e.g., *Hearings on S. 2594 and S. 2645 Before the Senate Banking and Currency Committee*, 82nd Cong., 2d Sess., pt. 1, at 302-04 (1952). Partial revision of the measure to meet just a few of the complaints was proposed by the Senate Committee with the following justification:

[T]he provision in its present form is unnecessarily restrictive and inflexible, and may result in injury to the American export trade and to American producers dependent on exports, disproportionate to the benefits resulting from the provision. S. REP. NO. 1599, 82d Cong., 2d Sess. 21-22 (1952).

Although GATT rules figured more prominently in the Walnut Logs hearings, *supra* note 40, the Administration case to the Congress urged primarily that (a) export controls achieved nothing from a conservation point of view as long as domestic consumption went unchecked; (b) there were really a lot more black walnut trees than had been supposed earlier; (c) restrictions on log exports hurt the balance of payments; and (d) the popularity of walnut veneer was not likely to last. See *Hearings, supra* note 40, pt. 1, at 80-84, 91, 173-79.

ticipation in the process. Because of the way political responsibility has been structured, Executive leadership has become the major outside influence over what Congress does in the day-to-day trade policy decisions which constitute the real margin of choice. Ultimately, therefore, the case for GATT rules in Congressional decision-making must be the same as that for the Executive itself.

C. *The Role of Substantive Rules in GATT Procedures*

Formal GATT procedures are rarely invoked before a government has taken some initial action. Consequently, the work done in GATT is usually directed to the more difficult task of persuading officials to reconsider decisions already taken. The greater difficulty of influencing policy at this point is a fact which should be underlined at the outset, for, although international procedures are in many respects more visible, they are probably not the arena in which substantive rules exert their most significant influence on government behavior. The point should not be taken too far, however. GATT experience indicates that a fair number of trade policy decisions rest on foundations that can be shaken by subsequent review—sometimes a too-limited view of possible alternatives, or perhaps a mistaken calculation as to trade consequences, foreign reactions, or GATT law itself.⁵⁶ There are, in addition, many decisions which have been closely contested at home and which pro-GATT officials have not yet accepted as final.⁵⁷

As presently constituted, GATT procedures can help to promote reappraisal in several ways. Formal GATT action can provide a new "event" that will serve as an excuse to reopen the issue. GATT procedures also offer a series of graduated steps—ritual expressions of nastiness—which communicate seriousness of purpose in a way that bilateral representation alone cannot do.⁵⁸ Finally, international action

56. In the Australian Subsidy case, for example, Appendix, Item A-8, the issue involved a consumer subsidy which, probably for reasons of its lesser visibility, was instituted in a rather indirect fashion that seemed to have unanticipated trade effects. The difficulty of proving the trade effects and the simple inertia against changing a standing practice had made the Australian government reluctant to consider alternative means.

Sometimes, it appears that decisions are taken by officials who are not close enough to GATT affairs to appreciate the consequences. See, e.g., Hudec, *supra* note 33, at 660-61. At other times, legal rights are simply miscalculated, as when United States lawyers (including the author) led themselves to believe that econometric analysis offered by the United States would be accepted as a measure of Article XXVIII rights in the Chicken War dispute, Appendix, Item A-26. See 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, *INT'L LEGAL PROCESS* 249-306 (1968).

57. This was the situation in the early stages of the dispute over American dairy products restrictions, Appendix, Item B-4, and in the long struggle to secure repeal of a certain French stamp tax. *Id.* at Item B-19.

58. Bilateral notes and representations have a dreary sameness about them which makes it difficult to distinguish real grievances from routine protests. GATT procedures

can certify the normative standards in question, validating the often-ignored claims of the government's own diplomats. Parallel to these pressure devices, GATT procedures also offer the opportunity to explore possible solutions through consultation and negotiation in a neutral setting.

The question to be addressed is whether a code of substantive rules contributes to the success of these procedures. The alternative, of course, is GABB. The GABB approach is sometimes described as a preference for "conciliation" rather than "confrontation."⁵⁹ The major difference is that GABB procedures would not be directed toward formal judgment about previously defined normative standards, but would seek to produce a satisfactory result through consultation in which all the relevant social and economic factors would be considered in depth. One hesitates to say that GABB procedures reject all forms of normative judgment, for even in negotiations both sides will strive to marshal the community's normative sentiments as a tool of persuasion. But GABB would reject prior standards, trusting instead to the analysis of causes and consequences to reveal whatever normative judgments are appropriate.

I would argue that "conciliation" procedures would not work as effectively as the more rule-oriented GATT procedures. The principal difficulty with the GABB approach is that it assumes a much greater degree of cooperation from the object government than usually exists. As a rule, the officials responsible for the decision will not have much enthusiasm for the idea of reversing themselves. In addition, even officials friendly to GATT objectives will often be wary of generating too much pressure for results they cannot guarantee. Although absolute refusal to participate is rare, these considerations frequently produce lesser forms of resistance along the line. The object government may try to find reasons for not discussing the matter at all. It may try to draw out and divert what discussion there is by insisting on consideration of as many other things as possible. And it may, as a final defense, take whatever plausible position there is in defense of its action and hold that position to impasse.

Resistance of this kind is difficult to deal with under any circum-

permit further demonstrations not available in bilateral diplomatic channels—first, the docketing of the issue on a formal agenda, then some public speeches, then the request for appointment of a Panel, then the request for a decision or ruling from the Panel, and finally, the same sequence of announcements and procedures to demonstrate the threat of retaliation.

59. The term "conciliation" is used in many different senses in GATT parlance, including occasional use as the title of the very "legalistic" Panel procedures.

stances. The only effective answer is to assert with some firmness a community judgment identifying what is expected at each point of resistance. Although it is sometimes possible to make such judgments in a completely ad hoc fashion, an uncooperative government can usually find some plausible justification for doing things its way, plausible enough to make it difficult for the community to insist upon its position on the basis of ad hoc judgment alone. By rejecting not only the means but also the objective of imposing any more systematic normative framework on its procedures, GABB puts itself at the mercy of any government practicing this all-too-well developed art.

The first difficulty likely to present itself is the matter of "jurisdiction." Consultations are seldom an enjoyable experience for the object government, and most governments will not undergo these discomforts for no reason at all. Under present GATT practice, breach of a particular rule is the most common justification for imposing such discomforts, one that will usually hold good until the matter is corrected.⁶⁰ GABB would have to work with something much more fragile. True, governments will usually agree to consult at least once about any measure that involves "trade damage," the distortion of existing or anticipated trade patterns. It is difficult, however, to sustain that justification for any extended length of time, for sooner or later the measure itself will become part of the status quo. The much-heralded "pragmatic" review of EEC trade consequences suffered just such a fate. Once the main outlines of the EEC were accepted as a fact, review became increasingly pro forma, until finally the EEC announced that completion of its transitional stage had made the EEC itself a fact, and that consequently there was no longer any justification for review at all.⁶¹

60. GATT waiver procedures under Article XXV usually establish periodic reviews as part of the price for the waiver. See note 86 *infra*. The record for longevity probably goes to the United States Section 22 waiver, GATT, 3d Supp. BISD 32 (1955), where reviews of United States measures, often quite vigorous, are conducted to the present day.

Legal violations which are recognized but not under waiver can likewise be held under review indefinitely. E.g., Brazilian Internal Taxes, Appendix, Item A-7 (annual reviews 1949-57); French Stamp Tax, *id.* at Item B-19 (annual reviews 1955-61).

61. GATT Doc. L/3124 (1968). For the decision establishing consultation procedures, see GATT, 7th Supp. BISD 69 (1959).

A similar result occurred in the case of the Greek-Turkish complaint over United States export subsidies on sultanas, Appendix, Item B-7. The complaint alleged trade damage, but in the absence of any obligation covering export subsidies, there could be no claim of legal violation. The United States went along with treating the matter as a special agenda item (i.e., as though it were a legal complaint) for two sessions, but when Greece proposed to continue the item on the agenda for another session the United States objected. American obligations would be discharged, it was said, by reporting on sultanas together with all other American export subsidies in the general report on such matters required by GATT Article XVI. GATT Doc. SR.8/12 (1958).

GABB's bias against normative judgments is likely to cause an even more serious problem with regard to the scope and purpose of discussion once it is begun. The problem is the one Professor Jackson describes in the passage, quoted earlier, arguing for some means of "chipping off" particular issues.⁶² Unless the parties have some agreed definition of what is relevant, each side is likely to want to discuss that part of the "total picture" favorable to its position. The consequence will be not only a paralysis of judgment at the end, but, long before that, an inability to elucidate the facts needed to make that judgment.

The difficulties GABB would probably encounter in this regard are illustrated very nicely by a case Professor Dam describes. The case involved a complaint by several governments protesting a discriminatory agreement between the EEC and several French African countries.⁶³ The parties reached a complete impasse on the question of whether the "association" agreement met the requirements of Article XXIV for free trade areas (a reminder, incidentally, that rules do not always work either). The parties then agreed to put the legal issues to one side and to search for a solution through GABB-type consultations examining in detail the actual economic effects of the association agreement. Dam makes the reasons for failure quite clear.

[T]he Six could not reach agreement with the majority of the working party on the relevant principles to be applied in determining the impact of the association upon world trade in those commodities.

. . . The position of most members of the working party was simple and straightforward: the association could necessarily open to the associated territories a vast barrier-free, protected market adequate to absorb not only present production but all foreseeable production by the overseas territories as a whole with respect to each of the twelve commodities. The effect would be, according to this analysis, to permit the associated territories to capture markets currently served by nonassociated areas; to encourage additional, and thus uneconomic, production in the associated territories, thereby necessarily causing even further diversion of exports from nonassociated territories; and, given what would become the inevitable need of nonassociated territories to find markets outside the Six, to depress world market prices.

To the Six, reasoning in this manner was reasoning in a vacuum. Harm to third countries could not be predicted without a forecast

62. See p. 1308 *supra*.

63. See pp. 1360-61 *infra*.

of future trade trends in world prices, at least through the transition period. The association would be only one factor among many that would determine the level of those prices. One could not overlook, the Six argued, the rising world standard of living, the stability of traditional trade patterns, or the physical, climatic, and financial problems affecting production in the overseas territories. More particularly, it would be improper to ignore the rising level of consumption within the Community itself which would result from the creation of the customs union.

The majority of the working party defended on several grounds the procedure of attempting to isolate the influence of the association from all other influences on prices. Third countries would be entitled to participate in the fruits of rising consumption throughout the world if there were no Treaty of Rome. Those countries were, moreover, entitled to participate in the rising consumption of the Six stemming from economic integration, since the expectation of increased consumption was an essential part of the rationale underlying the customs-union and free-trade-area exceptions to the most-favored-nation principle of the General Agreement.⁶⁴

The impasse cannot help but recall Jackson's hypothetical controversy quoted earlier.⁶⁵ And, interestingly, despite his general criticism of Article XXIV's focus on substantive rules rather than procedures,⁶⁶ Dam's answer, as Jackson's, is to write another set of substantive rules:

Although the difficulties faced in reviewing only twelve commodities in the EEC case suggest that there are some limitations on the results to be expected from such reviews, it is easy to exaggerate those limitations. The process would not always have to be so difficult as it was in the case of the Six. First, agreement that trade creation and trade diversion were the standards to be used in the review would facilitate matters greatly. The disagreements outlined above were primarily differences in standards. Second, the burden of coming forward with the relevant statistical and economic information could be placed squarely on the contracting parties seeking to institute the regional arrangement; if an obligation to show that trade creation exceeded trade diversion were placed unequivocally on the members of the regional grouping, one of the difficulties of obtaining information would be minimized. The GATT secretariat could also play an important role in providing the kind of expert statistical and fact-evaluation services which, for example, the staff of the Commission of the European Economic Community provides in intra-Community

64. DAM, *supra* note 13, at 292-93.

65. P. 1308 *supra*.

66. P. 1308 *supra*. For one possible explanation of the apparent contradiction in Dam's position, see note 185 *infra* and accompanying text.

matters. Finally, it might be possible, once agreement upon the trade-creation, trade-diversion standard were reached, to arrive at certain rules of thumb that would facilitate the analysis of particular proposals.⁶⁷

We turn, finally, to several related questions about the particular kind of results that GATT and GABB procedures are likely to produce. The central issue is GABB's insistence on examining the actual economic effects in each case. GATT procedures are admittedly different, for on many occasions rules are pursued in a manner which seems to ignore particular economic consequences. I would argue, however, that this more wooden approach very often serves a more useful purpose than would detailed economic analysis.

Many trade controversies do not require the detailed sort of analysis GABB would offer. Some of the normative standards which operate in this area accept certain adverse economic consequences as the price of recognizing other competing values. As I shall argue in Part III, I believe this is the case with many of the seemingly wooden GATT rules concerning regional economic arrangements.⁶⁸ Similarly, on some issues such as the measure of retaliation the dispute itself will be more political than economic, and the political need for demonstrable objectivity may well justify a somewhat arbitrary standard in place of one more difficult to apply.⁶⁹

67. DAM, *supra* note 13, at 294.

68. Pp. 1359-66 *infra*.

69. The point may be made about the GATT rules and practices for measuring the equivalence of bargaining concessions generally. Given the obvious impossibility of forecasting actual trade gains, the practical goal here is simply to keep all countries moving toward the same pace. In the short run, what the rules have to do is to prove to the home constituency that one's country is not losing out in any conspicuous fashion. Far from being a flaw in the system, the arithmetic which allows every single participant to report home a net gain in trade is doing exactly what it is supposed to do. For detailed commentaries on the GATT's approach toward reciprocity, see J. EVANS, *supra* note 3, at 21; DAM, *supra* note 13, at 58.

With regard to retaliation itself, I disagree with the criticism implicit in Professor Dam's charge that

In the "Chicken War" dispute . . . the discussions under Article XXVIII deteriorated into a silly and essentially meaningless battle . . .

DAM, *supra* note 13, at 374. The "battle" was over the quantity of retaliation the United States was allowed as compensation for the EEC withdrawal of a tariff concession. GATT practice called for comparison of the amount of trade under the tariff items involved, an issue which produced widely different estimates based on differences in the base years used, the influence of certain admittedly distorting factors, and the validity of statistical methods used. Dam's point, I suppose, is that none of this debate had any relation to the real damage the EEC was doing to the United States, or the real damage to EEC trade of the proposed American measures. If it is correct, however, to say that the primary purpose of retaliation is as a symbolic device to awaken the other side to the serious consequences of its policy, *see* note 48 *supra*, it becomes evident that the primary concern of both parties—and of the GATT itself—is to establish some standard of legitimacy so that the retaliation will not trigger something larger. The main test of such a standard is that it be acceptable, not only to the parties but, especially, to their constituencies back

Even where economic impact is the issue, there will be some cases in which it is more effective in the long run to stand by a rule based on a rather crude general prediction as to those effects. There are two reasons. The first is that the evaluation of economic consequences in particular cases is often quite difficult and conjectural, particularly since, if pressure is to be applied promptly, judgments must be made *before* there is any data as to actual effects. Even with the data, it is seldom very easy to separate the effects of any measure from developments in the economic situation generally.⁷⁰ As a consequence, such judgments run a great risk of being too inconclusive to have any persuasive effect in the heat of actual controversy. The second reason is an extension of the first. Because actual economic effects are so difficult to forecast, a standard of restraint based on such forecasts will have a far less limiting effect at the critical time when government decisions are first made. The temptation to wait-and-see is much too appealing. And, of course, once the measure is in motion, it is much more difficult to stop.

A related issue is whether, despite these advantages, the tendency to approach trade problems in terms of wooden rules may not blind the participants to the possibility of exceptional circumstances, as well as the general need to consider compromise. The question is basically one of fact. The GATT/ITO draftsmen certainly expected that their substantive rules would be applied with sensitivity to these limits.⁷¹ Contrary to some critics, I would argue that GATT practice has generally vindicated this expectation. Even in its most legalistic days, the GATT was quite generous with waivers and with other kinds of tolerance for delay and partial compliance.⁷² Then as now, special circumstances were invariably argued as the excuse for such deviations,

home. The numbers game played by the United States and EEC had two virtues: (a) the governments were willing to accept it, and (b) its arithmetic looked very objective to the general public. In the end, the Chicken War standard passed the essential test: it worked.

70. For a brief account of the GATT's reaction to requests for more detailed economic analysis in particular cases, see notes 192-93 and accompanying text. The Sardines case, Appendix, Item A-11, illustrated the typical kind of difficulties that arise. The controversy concerned differential treatment of two arguably substitutable products. Norway, the exporter of the disfavored product, produced evidence of a decline in trade following the imposition of differential treatment. The Panel concluded that, despite the evident likelihood of prejudice, there was no way of proving a casual link between the measures and the trade decline, owing to irregularities both in the composition of the trade (some of the sales were duty-free transactions with United States military installations) and in the prior volume of trade generally. GATT, 1st Supp. BISD 53, 56 (1953). The arguments over the EEC-African association quoted earlier, p. 1333 *supra*, give some idea of the range of items that would have to be considered.

71. See pp. 1313-14 *supra*.

72. See pp. 1337-38 *infra*.

and the decisions permitting them were justified in these terms. A similar flexibility has been evident in GATT legal proceedings themselves. While there have been individual cases in which governments probably held on to legal claims past the point of good sense,⁷³ such proceedings have generally been conducted with as much room as possible for negotiated solutions. Formal legal rulings have seldom been sought before the parties are in evident deadlock.⁷⁴ The rulings themselves have usually been expressed in terms that are soft and tentative, and have almost invariably been accompanied by an invitation to continue negotiations.⁷⁵ And, in fact, the parties have very often gone back to the bargaining table after a ruling and worked out a bilateral settlement.⁷⁶

The third and last issue about the comparative merits of rules versus negotiations is the increasingly common argument that introduction of legal claims will "poison the atmosphere" in a way which reduces the possibility of favorable action by the object government. I think the short answer is that the poison seems not to have been noticed very much during the years when lawsuits were very common. To be sure, legal rulings cause some discomfort.⁷⁷ That is one of their purposes. The word "poison" simply means that, for some reason, governments no longer consider the discomfort owing. That such a change in attitude has occurred is an important fact, one which must be examined carefully when we consider GATT's own experience in the following

73. I would agree with Professor Dam that the debate over the EEC's Common External Tariff under Article XXIV:5 was carried to unrealistic lengths by the EEC's critics, although for a somewhat different reason. Professor Dam finds the effort of the critics to work out other mathematical formulae more favorable to themselves a completely sterile exercise, and feels that more attention should have been paid to the real trade effects. DAM, *supra* note 13, at 292-94. I would argue that, wooden though it is, the mathematical averaging called for by Article XXIV:5 is about all that a GATT rule can ask for and evaluate; it seems to me that the EEC had made its case.

74. That fact should be apparent from the number of cases, listed in Part B of the Appendix, which were settled bilaterally. It must be remembered that almost all of those cases involved some initial charge of a legal violation.

75. The tone of the legal ruling will vary according to the anticipated difficulties a party is likely to have in complying. For some of the better examples of GATT's consummate command of ambiguity, see the rulings and recommendations in Australian Subsidy on Ammonium Sulphate, Appendix, Item A-8; Belgian Family allowances, *id.* at Item A-14; French Export Subsidy on Wheat Flour, *id.* at Item A-19. See generally, Hudec, *supra* note 33.

76. See the results listed in Part A of the Appendix.

77. When it suits their purpose, government officials can affect a worldly sophistication about GATT legal rulings which makes the very idea of "discomfort" seem ridiculous. The denial does not ring true. In addition to the testimony implicit in the word "poison" itself, there is also some interesting evidence in the GATT records themselves in the form of statements by government officials when they feel *wrongly* accused. See GATT Doc. SR.9/29 (1955) (Greek objection that "somewhat humiliating" Panel proceedings seem reserved for smaller countries); GATT Doc. SR.8/14 (1953) (inequity of bringing several legal complaints against Belgium when countries in weaker balance-of-payments position get away with same things).

section. For the present, it is enough to say that the allergy seems to be acquired rather than congenital.

III. GATT Rules in Operation

In Part III, I wish to examine the GATT's own experience with substantive rules, focusing in particular on the conditions which seem to have accounted for the relative successes and failures of GATT law over time. The main conclusions can be summarized briefly. The GATT substantive code did in fact work during the first decade, even better than the surface indications might suggest. The decline in the influence of GATT rules since then is equally striking. The decline can be traced, I believe, to two basic changes in the larger GATT environment. First, the GATT rules no longer command the very tight consensus they once did; in some cases the underlying consensus itself has broken down, and in others changing economic conditions have made rules inapposite to their original purpose. Second, both the passing of the postwar era and the subsequent realignment of GATT's membership into large blocs have removed some of the political incentives which led governments to work through a formal legal structure.

These developments have seriously undermined the basis of the old GATT code. At this moment, one cannot predict with any certainty whether there is a sufficient basis, either substantively or politically, for a new GATT code on the original model. Some limitations in the original design appear inevitable. I believe, however, that a careful look at the sources of breakdown will show that a good many signs of life remain—enough, I would argue, to justify setting in motion an attempt to renegotiate.⁷⁸

A. *The First Decade*

The most striking thing about the first decade of GATT legal experience was the extent to which GATT substantive rules were accepted as the framework within which business of all kinds was to be con-

78. The statement is made with an awareness of the diplomat's justifiable reluctance to launch any major negotiation without some pretty good expectation of success. As I point out later, however, the first step in any event must be a less formal exploration of possibilities among the major participants. I am saying that I believe there is a basis for launching that considerably more tentative sort of effort, at a minimum. Judgment as to what should follow that step must abide the event.

For a recent study which takes up many of these questions, see J. EVANS, *supra* note 3.

ducted. The record in terms of overall compliance, though far from disappointing, does not tell the entire story.

The GATT complaints machinery was used a good deal more than its formal decisions would have indicated. For the fifteen or so decisions actually rendered during this period, about twice that number of lawsuits were filed and then settled bilaterally.⁷⁹ Complaints usually took the form of a written request to put an item on the agenda, often no more than a paragraph sketching the nature of the legal dispute and asking for "consideration" by the Contracting Parties. These papers were often filed before bilateral contacts had been fully exhausted, just by way of preparing the groundwork.⁸⁰ The frequency and businesslike calm with which these steps were taken indicated, I believe, a wide-ranging acceptance of GATT substantive rules as a relevant ingredient in the solution of trade problems.

The GATT's less formal "consultations" also involved a good deal more attention to GATT law than appeared on the surface. A typical example is a case that Dam mentions briefly, and, I would argue, misconstrues. In the late 1950s when the European balance of payments crisis was over, most European countries found that they were unable promptly to remove quantitative controls protecting certain very weak sectors of their economies. The initial response of the United States was to press for compliance within fixed time limits,⁸¹ but when it became apparent that the problems were more intractable than had been supposed, the United States proposed a more gradual procedure of annual consultations and progress reports for the remaining countries involved, chiefly France and Italy.⁸² Dam cites this procedure as an example of

79. See Appendix, Part B.

80. Several weeks after filing the complaint concerning French export restrictions, Appendix, Item B-1, the American delegation had to request a postponement of formal discussion because it did not yet have all the facts. GATT Doc. CP.5/SR.5 (1950). Similarly, Belgium had to ask for a postponement in the case involving French and United Kingdom quantitative restrictions, Appendix, Item B-2, because bilateral discussions had not yet been completed. GATT Doc. CP.5/SR.16 (1950). A United States complaint concerning French stamp taxes was withdrawn after further bilaterals persuaded the United States that it had gotten the facts wrong. GATT Docs. L/245 (1954); SR.9/28 (1955). The emergence of the same complaint later in the year, Appendix, Item B-19, suggests that the United States may have been more unprepared than wrong.

81. The initial United States position was reflected in the adoption of a standard waiver form for post-balance of payments restrictions, the so-called Hard Core Waiver. GATT, 3d Supp. BISD 38 (1955). The waiver was used in the case of Belgium and Luxembourg. GATT, 4th Supp. BISD 22 (1955); *id.* at 27 (1956). A substantially modified form of the waiver was worked out for West Germany. GATT, 8th Supp. BISD 31 (1959). Everyone else fell under the later procedure.

82. GATT Doc. W.16/13 (1960). The procedure required governments to submit a list of restrictions still in effect, the so-called negative list, and to report and consult periodically about plans for reducing the number of restrictions. The governments involved generally complied with the procedure, though there was occasionally some conspicuous

the progress that can be made "without the necessity of poisoning the atmosphere through charges of illegality."⁸³ I would have stressed the opposite point, for it was the universally acknowledged "illegality" of these measures which led Italy and France to accept these tiresome and somewhat humiliating procedures. The clearest indication of this understanding was the fact that, when French interest in the procedure (never very keen to begin with) began to flag, the United States filed a formal Article XXIII complaint to make clear its dissatisfaction.⁸⁴ Shortly after the decision reaffirming United States rights, bilateral consultations produced some further liberalizations, and the United States announced that it was satisfied for the moment. Though perhaps the dying gasp of the old system, the case does demonstrate rather clearly the underlying legal structure on which the old system worked.⁸⁵

The same recognition of the legal norms was present in the cases involving flat noncompliance. The invariable response was to seek a formal waiver. A request for a waiver constitutes an implicit recognition of the rule's continuing validity, not only in the plea itself but also in the willingness to accept the sometimes cumbersome control procedures which usually accompanied waivers. Some waivers during this period were as demanding, in terms of procedures and detailed criteria, as the General Agreement itself. Two waivers requested by the United Kingdom even had their own disputes procedures to apply the criteria in question, and the procedures were actually used on two occasions.⁸⁶

foot-dragging. France did not produce a complete negative list until 1969. GATT Doc. L/3212/Add.12 (1969).

83. DAM, *supra* note 13, at 354.

84. Appendix, Item A-22. The United States also filed an Article XXIII action against Italy for the same reasons, but withdrew the complaint, before the Panel was convened, upon reaching a satisfactory settlement. *Id.* at Item B-34.

85. Another example would be GATT's very "informal" approach to reviewing compliance with the Article XII rules on balance of payments restrictions. Although the Contracting Parties once turned down a proposal to subject such restrictions automatically to more rigorous legal analysis by Panels, see GATT Docs. L/392/Rev.1 (1955); SR.10/1 (1955), the prevailing informality was broken at least three times when governments thought that the rules had been bent too far. See Appendix, Items A-12, B-2 and B-13.

86. Both United Kingdom waivers involved permission to exceed Article I limits on margins of preference in cases where, arguably, there would be no trade diversion. See GATT, 2d Supp. BISD 20 (1953), amended, 3d Supp. BISD 25 (1955); *id.* at 21 (1955). For the decisions, see Appendix, Items A-21, A-25.

Professor Jackson has compiled a complete table of waivers and their reporting requirements up to January 1, 1969. JACKSON, *supra* note 14, at 549-52. With the exception of (1) waivers allowing implementation of tariff revisions pending completion of ongoing renegotiation procedures and (2) waivers releasing certain non-IMF members from the need to enter special monetary agreements, almost all waivers have either provided for annual reviews or have been of short enough duration to require extension procedures which amount to the same thing.

The relative success of the GATT legal structure during these years rested on a particularly favorable set of community attitudes. Three aspects of this broader legal environment deserve to be mentioned. First, during this period there was a reasonably firm consensus behind most of the specific rules in question, and behind the tenor and balance of the GATT code as a whole. The consensus went much further than the written rules. On a number of occasions GATT Panels succeeded in resolving textual ambiguities and omissions by drawing upon community policies and assumptions outside the Agreement itself.⁸⁷ In addition, Panels were also able to issue authoritative judgments as to whether other practices had frustrated the “reasonable expectations” underlying a particular tariff bargain, even though the practices themselves were not in violation of any express rule.⁸⁸ One could, without stretching things, speak of a developing common law jurisprudence.

Second, if one can credit a number of statements both on and off the record, there was a rather uniform belief during this period in the importance of maintaining the integrity of the legal structure itself. Many of the complaints stressed that the legal issue being raised was primarily one of principle, and frequently other governments would join in urging that special attention be given to a particular complaint

87. I have argued elsewhere that this is true of the Panel decision in the Belgian Family Allowances case, Appendix, Item A-14. Hudec, *supra* note 33, at 636-65.

Another small but striking example is the ruling in the Indian Tax Rebates case, Appendix, Item A-2. The issue was whether the reference in Article I:1 to “all matters referred to in paragraphs 2 and 4 of Article III” meant that the MFN obligation applied to taxes affecting exports, given that the specific obligations of Article III mention only taxes affecting imports. The Chairman of the Contracting Parties said yes. GATT Doc. CP.2/SR.11 (1948). Then, during the 1954-55 Review Session, the Contracting Parties adopted, for subsequent ratification, an amendment to Article I incorporating the ruling. The amendment, however, applied Article I only to *taxes* on exports (the subject of III:2) and not to other *internal regulations* affecting exports (the subject of III:4). While the distinction makes sense as a policy matter, given the reach of a rule affecting Lord-knows-what internal regulations, that distinction could not have been made as a legal interpretation of the original text which simply referred without distinction to “paragraphs 2 and 4.” What the Contracting Parties had done, in fact, was to decide that it made sense to apply the MFN rule to export taxes (even if not to other internal regulations), and to bend the text a little to get there. Interestingly, India reserved on the ruling at the time and later rejected it categorically, GATT Doc. CP.3/6 (1949), before going on to settle the matter amicably in compliance with the ruling. Also interesting, though probably of no practical consequence, is the fact that the Article I Amendment failed to secure the unanimous ratification required for formal adoption (lacking one vote for entirely technical reasons), see GATT, 16th Supp. BISD 16 (1968), leaving the 1948 Chairman’s Ruling once again naked to the winds.

Other examples of creative legal rulings during this period would include the development of the “reasonable expectations” standard as the test of non-violation nullification and impairment. Appendix, Item A-8, the application of the Protocol’s “existing legislation” rule to overall increases in the rate structure of discriminatory taxes, *id.* at Item A-7, and the development of a quite discretionary standard for reviewing proposed Article XXIII retaliation, *id.* at Item A-10, adopted despite criticism GATT Docs. SR.7/16, -17 (1952).

88. See notes 95-97 *infra*, and accompanying text.

because of the importance of the precedent.⁸⁹ Governments in violation of the rules were repeatedly warned of the disrespect they were creating for the legal structure as a whole.⁹⁰ When the rules worked, governments generally announced their changes in policy as a sacrifice made for the good of GATT law.⁹¹ Collapse of the GATT legal code was, I think, genuinely perceived to be an undesirable event, a "cost" to be avoided if possible.

Third, government responsiveness to GATT rules did not seem to require very much attention to the niceties of "legal obligation," a fact which permitted GATT law to operate in a manner just as flexible, if not more so, than that intended by the 1947 draftsmen. The legal status of the Agreement itself was never made entirely clear. It came into force (and still exists) by means of a Protocol of "Provisional Application," a term which has had different meanings for different members.⁹² Day-to-day legal practice soon began to develop along the same lines. Various modifications of the Agreement and its schedules were generally treated as operative without regard to when, if ever, they formally came into effect.⁹³ Many of the early GATT's legal interpretations were written in a form which purposefully failed to make clear whether the suggested result was a legal requirement or merely a piece of friendly advice.⁹⁴ The ambiguity seemed to make no

89. See, e.g., GATT Docs. CP.4/SR.14, -15 (1950) (Appendix, Item A-8); CP.5/SR.14 (1950) (Appendix, Item A-9); SR.9/7 (1954) (Appendix, Item A-16).

90. See, e.g., GATT Docs. L/160 (1953) (Appendix, Item A-7); Press Releases GATT/42, -43 (1951) (Appendix, Item B-4); and IC/SR.33 (1958) (Appendix, Item A-20).

91. See, e.g., GATT Docs. L/134 (1953) (Appendix, Item A-14); Press Release GATT/79 (1952) (Appendix, Item B-3).

92. The text of the Protocol, which has been used for all subsequent accessions as well, appears in 4 GATT, BISD 77 (1969). The term "provisional application" was originally intended to signal the fact that the GATT was to be absorbed within, and in large part replaced by, the parallel provisions of the ITO Charter—a formal treaty obligation. Although the Protocol contains various express limitations on the signatories' legal obligations, such as the reservation for existing mandatory legislation and a very short 60-day termination provision, the term "provisional application" itself has, so far as I can tell, no operative meaning within GATT. (Many GATT officials have fallen into the habit of equating the term with the express reservations, causing no little confusion in discussion.) The term may have some significance as a matter of domestic law, for some countries. In 1965, GATT proposed that governments drop the word "provisional" while retaining the express reservation for existing legislation. GATT Doc. L/2375 (1965). In conversations with the author, a senior GATT official reported that several European governments balked at the proposal on the ground that the change of words would raise problems of domestic law about the status of GATT. This would not be the case in the United States; GATT's status as an Executive Agreement would not be changed by a new form of words. On the concept of provisional application generally, see JACKSON, *supra* note 14, at 60-66.

93. See, e.g., JACKSON, *supra* note 14, at 96-100 (accession of new members); *id.* at 236-38 (rectification of tariff schedules). For a discussion of more recent practice, see note 187 *infra*.

94. See the rulings cited in note 75 *supra*. For a more direct illustration of the same point, see Appendix, Item B-28, discussed in note 187 *infra*.

difference. The judgment that a member was not behaving in accord with community norms seemed to be the main ingredient of what compulsion there was, and compliance would usually follow, sooner or later, without particular emphasis on "obligation" per se.

The clearest example of this tendency was a line of cases dealing with something called "nullification and impairment," a GATT analogue to the contract law doctrine of frustration. As interpreted, the doctrine provides that actions by one party which deprive another party of "reasonably anticipated" benefits of a tariff bargain create a right to readjustment, even if the action causing impairment is one clearly permitted by the General Agreement.⁹⁵ Two early GATT decisions under this doctrine found the defendant guilty of impairment.⁹⁶ Although both decisions made it quite clear that GATT could not "legally require" removal of the measures causing impairment, both defendants seemed to regard the finding of impairment as a source of compulsion to do just that. In one of the cases, indeed, the losing party filed a dissent which charged, in effect, that the Contracting Parties were imposing a new obligation that had never been consented to.⁹⁷ The failure to appreciate the distinction between "impairment"

95. The concept of reasonable expectations, which has no foundation in the text of the Agreement, was originally propounded in the 1949 decision concerning the Australian Subsidy on Ammonium Sulphate, Appendix, Item A-8. It was confirmed a few years later in the decision of German Duty on Sardines, *id.* at Item A-11, and was elaborated further in the rulings made in Uruguayan Recourse to Article XXIII, *id.* at Item A-24.

The exact reach of the doctrine, as it applies to nonviolation cases, is unclear. It is usually thought of in situations where the event causing impairment of benefits is the action of the other party, the situation in which domestic courts find it easiest to discover frustrations. The first two cases cited above involved impairment of this kind. Article XXIII also speaks of impairment caused by "any other situation," a term which was intended to cover gross economic dislocations such as a world depression. The Uruguayan complaint made occasional reference to this concept but did not press the idea, *see also* note 111 *infra*. Whether the concept would encompass more discreet nongovernmental events, such as the action of a private cartel, is a nice question that has not been tested.

Although the immediate objective of the concept was to protect the balance of tariff concessions, the provision speaks in terms of any "benefit accruing . . . directly or indirectly under this Agreement," and goes on to include impairment of "any objective of the Agreement." The Uruguayan complaint cited above also involved an attempt to invoke these broader provisions in the context of a charge that Uruguay was giving more than it was getting. Although the Uruguayan delegation prepared a list of some 562 restrictions, legal and illegal, affecting Uruguayan exports, Uruguay failed to develop either the trade information or the legal theory necessary to press the issue, and the Panel fell back to an item-by-item survey of impairment.

96. Australian Subsidy on Ammonium Sulphate, Appendix, Item A-8; German Duty on Sardines, *id.* at Item A-11.

97. Australia was held to have impaired a concession to Chile because an unforeseen change in an existing subsidy policy had created a competitive disadvantage for the Chilean products. Australia argued that the finding of impairment was in error because, according to the well-understood practice of negotiating tariff agreements, a country could not "assure" itself of protection going beyond the rules of the General Agreement unless it expressly negotiated for such assurances. The possibility of rulings based simply on reasonable expectations, the dissent continued, made tariff agreements "extremely hazardous commitments." 2 GATT, BISD 188, 195-96. In arguing this way, the dissent

and "obligation" was understandable. Whatever its legal characterization, the decision as to "reasonable expectations" had unavoidably become a formal adjudication of what the community regarded as "reasonable,"⁹⁸ thus giving it essentially the same force of compulsion which lay behind GATT obligations themselves.⁹⁹

was treating the ruling as though it had announced a legal commitment not to impair, for that is what expressly negotiated assurances would be. Technically, however, the finding of impairment involved no legal commitment at all; it was just an excuse allowing the other party to back out.

Though less striking, the Sardines case offers a similar example. Appendix, Item A-11. The case involved a finding that Germany had impaired a tariff concession on Norwegian-type sardines by subsequently granting a much lower rate on competitive Portuguese-type sardines. Although Germany's response to the decision—pegging the concession rate a miniscule one per cent above the rate on the competing product—was designed to affirm the absence of any legal obligation to make the rates equal, the fact that Germany did restore the competitive situation by making a rather large reduction nonetheless (from 20-25 per cent to 15 per cent) is quite significant. The reduction required seeking new legislation. Until the decision itself, German officials had fought vigorously to avoid that necessity, maintaining their position on the merits until the very end. Despite the very clear understanding of the decision's limits, there seemed to be no doubt about the course of action to be taken after it had been made.

98. This is a proposition which the Panel or working party members themselves might dispute. Nevertheless, I believe that analysis of the issues in both cases will show that such normative judgments could not have been avoided. Any third party putting himself in the position of trying to decide what another might "reasonably expect" is quickly led to the proposition that, absent advance warning to the contrary, any reasonable man expects the other party to behave reasonably in the circumstances. In both these cases, the issue involved differential treatment of competitive products; both complainants, in fact, were also arguing that the discrimination violated Article I because the products were "like products" within the meaning of that provision. Although the judges could not agree with the "like product" charge, mainly because pre-GATT practice had imposed very tight limits on that concept, there was little doubt in either case that the unequal treatment of competitive products was contrary to the underlying policy of the agreement. Although in both cases there were specific events in the negotiating background on which the expectation could be found to have been based, and, indeed, there are indications that the decision might not come out the same way without such a peg, the larger concerns pervade each opinion. In the Australian Subsidy Case, for example, the working party report sums up by saying,

In the case under consideration, the *inequality* created *and* the treatment that Chile could reasonably have expected at the time of the negotiation . . . were important elements in the working party's conclusion.

2 GATT, BISD 188, 193 (emphasis added).

99. Another factor which contributes to the similarity of impact is the "lawsuit" framework in which these judgments are rendered. Although nullification and impairment decisions do not obligate the offending party to act, they do involve legal consequences insofar as they withdraw the complaining party's obligation to the offending party. Consequently, the decisions invariably assume the same judicial sort of care and considerateness which surround legal decisions generally, and which furnish a not insubstantial part of the latter's authority.

This is not to say that rules add nothing to the force of compulsion. Rules make it easier for Panels to make judgments in the first place, for the unity of consensus necessary to sustain pure common law decisions of the kind we are discussing is a very rare commodity in international organizations. More to the point, rules will give a decision greater authority to the extent they call upon the fact that the offending member itself has subscribed to the proposition being asserted. What I am arguing is simply that GATT practice does not show any significant source of compulsion in the notion of legal obligation itself.

It is true, of course, that GATT diplomats invariably seek to invoke the notion of legal obligation wherever possibly, even in cases where its existence is doubtful. *See, e.g.*, Hudec, *supra* note 33, at 647-59. The question being asked here, however, is why and to what effect. It is my view that the forces being advanced by such argument are primarily the factors discussed above.

B. *The Current Situation*

1. *Present Legal Practice*

The one point on which both legalists and pragmatists invariably agree is that GATT legal behavior has changed substantially in the last decade. Attitudes toward the formal disputes procedure are indicative of what has happened generally. Once rather proud of the GATT's Panel procedure,¹⁰⁰ member governments now seem to regard requests for formal legal rulings as unfriendly behavior inconsistent with effective commercial diplomacy. Complaints involving out-and-out legal disputes are now routinely channeled into procedures other than Panels—either ad hoc working parties or the more structured consultation procedures of Article XXII, neither of which is aimed at producing third-party judgments.¹⁰¹ A small but significant sign of the times is the fact that recent indexes of GATT documents now classify the very mild reports from these proceedings under the heading "Conciliation," the title once reserved for formal Panel proceedings.¹⁰² The practice seems to suggest that these no-decision procedures are now regarded as the standard GATT lawsuit.

Just how sensitive governments have become can be seen from two recent examples. In 1967, following extensive bilateral discussions, the United States brought a complaint before the GATT charging that certain practices of the nationalized British Steel Corporation violated GATT obligations. The United Kingdom replied that the practice was completely legal. In agreeing to pursue the matter further under the consultative procedures of Article XXII, both parties felt it necessary to make clear that this very mild procedure was in no way to be regarded as a "confrontation."¹⁰³ At about the same time, the

100. GATT's public stance toward its "law" has always been torn between the demands of pride in recording the accomplishments of a working international legal structure and the demands of survival in not exciting governmental sensitivities about loss of sovereignty. Nevertheless, statements affirming the value and importance of GATT's quite legal dispute-settlement procedures abound in the early GATT documents and public literature. See, e.g., GATT Doc. Press Release GATT/169 (1954) (review of accomplishments by Chairman of Contracting Parties).

101. Working parties have been used on occasion to render third-party judgments, usually in cases where the GATT had some reason to play down the presence of adjudication. See Appendix, Items A-5, A-8 and A-10. As a rule, however, the working party is understood to be a negotiating rather than an adjudicating device. The principals in the dispute are the stars, and nothing is done without their consent. Absent a voluntary settlement, the usual working party report is simply a balanced recital of views pro and con, concluding with a paragraph in which everyone promises sympathetic consideration to everyone else's views. On rare occasions, a determined majority may force a type of quasi-adjudication by recording that a certain view represented a clear majority, e.g., Appendix, Item A-20, but the general practice is to record each side equally.

102. See Appendix, note (d).

103. See Appendix, Item B-36. In a curious way, the concern may have been slightly justified. The more that such nonadjudicatory procedures become identified as the last resort, the more the decision to invoke them comes to represent the *démarche* once asso-

United States held out against the convocation of Article XXII consultations on problems of the world dairy markets (a problem which did not involve *any* charges of legal violations) on the ground that the Article XXII procedures themselves might be regarded as a confrontation by outsiders.¹⁰⁴

A few efforts to revive Panel procedures for other purposes have met with conspicuous failure. In 1967, the developing countries of GATT persuaded the Contracting Parties to accept a procedure which provided that

[P]anels of governmental experts may be established to examine problems relating to the quantitative restrictions maintained by developed contracting parties on industrial products of particular interest to developing countries with a view to an early removal of these restrictions.¹⁰⁵

The Secretariat duly prepared background material for Panel proceedings in a few key industries. In the first case, the proposal to convene a Panel was met by the response that the above decision had used the word "may," and that bilateral discussions, then in progress, seemed a more fruitful way to proceed.¹⁰⁶ The special procedure is now generally regarded as a dead letter. More recently, the Trade and Development Committee came up with the idea of appointing Panels to review compliance with the new "commitments" assumed by developed countries under Part IV of GATT. Although the Panel procedure added nothing to the procedures already available as of right under Article

ciated with filing a lawsuit. I have heard, for example, GATT representatives speaking of "threatening" an Article XXII consultation. One might argue, therefore, that the lawsuit's function as a demonstration of serious concern, *see* note 58 *supra*, has been maintained despite the movement to the milder climes of Article XXII.

104. *See* GATT Doc. SR.24/19 (1967). The Director General's explanation of the deadlock, itself a departure from the usual practice of not talking about such disagreements in formal meetings, is worth quoting:

The language of Article XXII made it quite clear that the invocation of that Article was not a hostile procedure nor a litigious one. Nevertheless, psychologically and politically it could risk having that appearance and therefore might impair the objective of a friendly and collective approach to problems of common concern to the international trading community.

Id. It was agreed, finally, to call for immediate action without specifying the exact form such action would take.

105. GATT, 15th Supp. BISD 71 (1967). According to a Secretariat paper circulated in advance of the decision, the Panels were to have analyzed all the relevant trade and production information pertaining to the restricted products, and "the compelling reasons of national interest that stand in the way of the removal of restrictions." A Panel would then "report its views on how progress may be made in the removal of these restrictions." GATT Doc. COM.TD/W/68 (1967). Although the terms of reference would have permitted rather benign factual surveys, the choice of the word "Panel" suggested, as was intended, the possibility that "views" might also include an evaluative judgment of the "compelling reasons."

106. *See* GATT Doc. COM.TD/56 (1968).

XXIII, the proposal had to be amended expressly to provide that Panels would be appointed if and when the party complained against would agree.¹⁰⁷ The result served as an indication of what to expect from direct invocation of Article XXIII itself.¹⁰⁸

Much the same attitude appears in areas outside the complaints procedure. Since the late 1950's the GATT has been trying to secure the removal of the so-called "residual restrictions," developed country quantitative restrictions left over from the days of payments disequilibrium.¹⁰⁹ In the 24th and 25th Sessions of the Contracting Parties, the government of New Zealand, supported by many developing countries, proposed a decision which would have committed governments either to remove the restrictions or to seek a formal waiver to legitimize them. Despite the furor it raised, the proposal was really a rather mild one. Everyone admitted that waivers would have been granted, so that the only practical effect would have been to require governments to bend their knee by asking for a waiver and, later, to submit to the annual review and exhortation required of all other GATT waivees. The countries maintaining the residual restrictions refused to go even this far. Some explained their position by lecturing the proponents on the unwisdom of seeking legalistic solutions to sensitive social problems. Others said that they saw no reason for submitting to these legal restraints and humiliations when so many other governments were free to pursue similar practices under one or another GATT exception.¹¹⁰

A similar pattern has developed in the case of new measures involv-

107. Compare GATT Doc. COM.TD/W/116 (1970) (draft proposal) with GATT Doc. COM.TD/74 (1970) (final text).

108. The presence of these attitudes force one to attach relatively little significance to the 1966 Decision of the Contracting Parties establishing new procedures to expedite the processing of Article XXIII complaints. GATT, 13th Supp. BISD 18, 139-40 (1966). The new procedures were proposed by GATT's developing country bloc as part of the general campaign to make developed countries honor GATT obligations. The new procedures make it easier for developing countries to initiate such lawsuits, and to carry through on rights of retaliation. They do not, however, address the real problem—the developed country annoyance with lawsuits generally, and the fear on the part of developing countries that lawsuits sparking such annoyance will ultimately bring reprisals. The two Panel proposals described in the text were really a confession by the developing countries that the direct Article XXIII lawsuit would not work. (In fact, the new Article XXIII procedures were never even used.) The idea of the new Panel proposals was to circumvent the confrontation problem by making the Panels more-or-less self-starting, thus removing the need for a complainant. (A third example of this strategy is the disputes provision of Part IV itself, Article XXXVII:2(a); the cumbersome use of the passive voice (compare Article XXIII:1) was the product of endless hours of drafting trying to describe a lawsuit without a plaintiff.) The fact that none of these alternative strategies have succeeded tends to confirm the existence of the problem which led to the abandonment of Article XXIII. Unfortunately, it also proves that the problem is not one that can be met by strategies.

109. The procedures described in note 82 *supra* were part of this overall effort.

110. See GATT Docs. W.24/22 (1967); SR.24/10, -12, -14 (1967); and L/3034 (1963).

ing some real or alleged departure from GATT rules. The typical scenario begins with a sometimes heated discussion of the legal issue in the first meeting, followed by a decision to put the legal issues aside in order to concentrate on pragmatic considerations.¹¹¹ These new procedures tend to have a precedential effect. Having once decided not to be "legalistic" about Problem *A*, the Contracting Parties thereafter need some special justification to do anything different with Problem *B*. Given such expectations, the perception of legal rulings as a particularly unfriendly procedure tends to become true after a time.

I believe there are two main reasons for the present decline of GATT substantive rules. First, in many areas the substantive consensus which held together the early GATT has broken down under the pressures of a changing world. Second, interest in working through a legal structure of any kind seems to have diminished—in part because of weakened substantive consensus, but also, I think, because of other fundamental changes in GATT's political environment. Each of these developments will require a rather extended treatment.

2. *The Present Substantive Consensus*

The state of the substantive consensus underlying the various GATT rules varies from one subject to another. Change is apparent everywhere. A few of the changes represent shifts in basic attitudes, but perhaps the larger number represent changes in market conditions which were not anticipated in 1947 and which have made the 1947 rules inadequate to their original purpose. In some areas the breakdown appears to be quite serious; in others it appears reparable.

I shall divide the inquiry according to type of country and subject matter. The rules applicable to "developing"¹¹² countries will be considered separately. Following that, the trade rules which affect primarily

111. A typical example was the case of the import restrictions imposed by France in 1968 to adjust for the large increases in wages and other cost factors made necessary by the "events" of May 1968. The French government stated that in its view the measures were not in violation of the General Agreement, mentioning Articles XII, XIX and XXIII but not advancing any supporting arguments. The French delegation went on to state that it was pointless to examine the legal aspects of the matter, assuring everyone that France would do its best to remove the measures as conditions permitted. Many other delegations criticised the legal justification and France's refusal to discuss it, but the French held to their position and eventually there was grudging agreement to go along. The net result was that France was allowed to maintain that it was not in violation, without ever having to demonstrate it. See GATT, 16th Supp. BISD 57, 63 (1968).

112. That is, the poorer nations, known as "underdeveloped" in the 1940s and "less developed" in the 1950s and early 1960s. One can read the history of the so-called Revolution or Rising Expectations in the evolution of this terminology. The official GATT term, if one goes by the text of the Agreement, is still "less developed"; both Article XVIII (which defines the term) and Part IV were written during the LDC phase.

the developed countries will be discussed under three headings: restrictions on agricultural trade, restrictions on industrial trade, and discrimination. A final section will deal with the GATT rules concerning balance of payments disequilibrium.

a. *Developing Country Obligations*

The consensus behind the GATT obligations undertaken by developing countries has broken down virtually across the board. GATT was originally designed to treat developing countries in essentially the same manner as developed countries. Although a few carefully limited status exceptions were granted, the overall design called for developing countries to follow a liberal trade policy based on reciprocal exchange of commercial opportunity.¹¹³ The developed country officials who wrote the GATT were not insensitive to economic development goals, but they were convinced that "genuine" economic development required the discipline of world market forces.¹¹⁴ Whatever else experience since then may have proved, it has proved that the pace of economic development under these premises has not been rapid enough to satisfy anyone. Consequently, there is now a consensus which either advocates or is at least willing to tolerate rather thoroughgoing interference with market forces as an aid to development.

Most developing countries never got very close to the real bite of GATT obligations, because chronic balance of payments problems have permitted perpetual quantitative control of imports.¹¹⁵ GATT supervision of the remaining obligations, though still occupying a sizeable part of each year's agenda, has grown progressively formalistic and less attentive.¹¹⁶ The principle of nondiscrimination (the most-favored-nation rule) has held on longer than most, but it, too, is giving way under a growing acceptance of the need for larger-than-national

113. The principal exceptions for developing countries in the ITO Charter were Articles 13 and 15. The GATT adopted and later expanded upon Article 13 (now GATT Article XVIII). ITO Charter Article 15, permitting selected preferences between developing countries, was omitted from GATT altogether; not until recently has there been a serious possibility of restoring it. See DAM, *supra* note 13, at 251-55.

114. Clair Wilcox, vice-chairman of the United States delegation to the GATT/ITO negotiations, explained his delegations's position:

Enthusiasm for industrial development is accompanied by little interest in the conditions that must be satisfied if such development is really to be achieved.

. . . The underdeveloped countries seek industrialization by some quick and easy route. . . . They do not believe that they must creep before they can walk.

Wilcox, *supra* note 30, at 143. See KOCK, *supra* note 30, at 41.

115. See, e.g., KOCK, *supra* note 30, at 290.

116. The situation is simply that no one talks very much about developing country obligations anymore, except to criticize the existing rules; all attention is focused on what developed countries are doing for developing country trade. Authors writing about GATT's developing country "problem" do the same thing. See, e.g., *id.* at 219-69.

markets for developing country infant industry. GATT customs union theory was the first casualty. Far from attempting to meet the criteria of Article XXIV, most developing country customs unions are avowedly designed to distort trade as much as possible for infant industry purposes, and that purpose now seems to have been tacitly accepted by GATT's developed country members.¹¹⁷ More recently, the developed countries have agreed, in principle, to grant tariff preferences in favor of developing country products.¹¹⁸ Whether or not the preference scheme will actually accomplish very much, the decision to grant such preferences is important as an indication of what will now be tolerated.

Neither the developed nor the developing countries have shown much interest so far in devising a new set of rules to cover developing country trade policy. The legal response to the development crisis has been concentrated almost exclusively on devising means to open developed country markets. The GATT was amended in 1964 to include a new Part IV which sets forth a series of principles recognizing the special needs of developing countries and a few very guarded "commitments" by the developed countries to do something about them.¹¹⁹ Developing country obligations, in the meanwhile, are simply in abeyance.

Though one can hardly quarrel with the judgment as to priorities, it must be observed that the new order of things has substantially diminished the chances of establishing any sort of viable *legal* relationship between rich and poor. Even in the best of circumstances,

117. For a detailed review of both developed and developing country regional arrangements under GATT Article XXIV, see Dam, *Regional Economic Arrangements and the GATT: The Legacy of a Misconception*, 30 U. CHI. L. REV. 615 (1963). I would argue that it is a mistake to treat developed and developing country regional arrangements as a single body of evidence relating to the workability of the GATT rules. The failure of the rules in the case of developing countries rests on reasons which do not pertain to the problem of regulating developed country arrangements. Indeed, one is tempted to say that Article XXIV was not even drafted with the developing countries in mind. The General Agreement recognizes, albeit grudgingly, the right of developing countries to raise trade barriers for the purpose of industrial development—the infant industry idea. GATT Article XVIII. The rules of Article XXIV, by requiring elimination of internal barriers and a status quo ante ceiling on external barriers, say, in effect, that a developing country must give up the infant industry idea if it wishes to join a customs union. Conceivably, this might have been an intended consequence, given the perspectives of 1946-47, but the inherent contradiction has now become clear with the recognition that markets of individual developing countries are as a rule not large enough to support modern infant industries. Also relevant to this issue is the history of ITO Charter Article 15, note 113 *supra*.

118. U.N. Doc. TD/L.37 (1948) (Report of UNCTAD II). The EEC has announced the implementation of preferences as of July 1971. See 2 CCH COMM. MKT. REP. ¶ 9425 (1971).

119. In the eyes of developing countries, results have been slow to come. See U.N. Doc. TD/16 (1967) (developing country analysis of Kennedy Round results), reprinted in FULDA & SCHWARTZ, *supra* note 43, at 204-08. See also PREEG, *supra* note 48, at 258-59.

it is difficult to create legal relationships which can be asserted independently (*i.e.*, “chipped off”) from the general donor-donee relationship which exists on other matters. It is just that much more difficult when the claimants themselves are perceived to be operating outside the legal system they invoke. The problem is not primarily one of commercial reciprocity. It is, rather, a question of legal reciprocity—the difficulty of insisting upon adherence to substantive rules when the claimant itself does not submit to any.

There is good reason to wonder whether it is possible to define a new set of developing country obligations in the present circumstances. Developing country governments will not be able to undertake international commitments in any form until they know where they are going, and what trade policies they will need to get there. To judge by the current unwillingness to restrict any instruments of trade policy, that measure of certainty has not yet arrived. As yet, however, the possibilities of redrafting have not been tested.¹²⁰

b. *Developed Country Obligations*

(1) *Restrictions on Agricultural Trade.* GATT’s rules on agricultural restrictions are usually the first item mentioned when the subject of GATT “failures” is discussed.¹²¹ The failure has been real and complete, though not nearly as colossal as usually portrayed. The GATT draftsmen took it as given that governments were committed to maintaining high prices for domestic agriculture, and that quantitative restrictions would be needed to protect such artificially lucrative markets from being swamped with imports. The condition the draftsmen tried to impose was simply that imports should be allowed to share roughly the same *proportion* of the domestic market—high prices and all—that they would have occupied under normal market conditions.¹²² Simple, perhaps, but too much to ask nonetheless.

The basic miscalculation here seems to have been a failure to anticipate the forces, economic and political, that are generated by price support programs. As late as 1953, one finds GATT debate proceeding

120. For discussion of one possible approach, see p. 1369 *infra*.

121. The restrictions in question are those used by a large number of developed countries to protect producers of temperate agricultural products. Though most of the restrictions are the result of government price-support programs, some, such as the United States program on meat imports, are simple cases of protecting a normal domestic market. See 7 U.S.C. § 1854 (1970). For one account of the current situation, see Malmgren & Schlechty, *Rationalizing World Agricultural Trade*, 4 J. WORLD TRADE L. 515 (1970).

122. GATT Article XI:2(c).

on the premise that it should be possible to reduce domestic production enough to make room for imports.¹²³ Instead, of course, the price levels required to satisfy constituents have consistently created the booming surpluses we have come to know all too well—first in the United States, and now, just as a few signs of control are appearing there, in the new common agricultural market of the EEC.¹²⁴ The rapid development of new technology in production, transportation and product substitutes has made it even harder to satisfy national, much less international, goals. And, as if that weren't enough, the flow of excess production into subsidized exports has destroyed even the premise of a world market price by which to measure competition in third country markets.

In most cases, governments still cannot make room for imports within their price support programs, and, where they can, the market criteria for determining fair shares are becoming increasingly less reliable. For want of anything better, normative argument about market shares now tends to focus on last year's share. Governments keep trying to hammer out ad hoc agreements on particular commodities, without much long-term success.¹²⁵

The prospects for reviving GATT-type rules will be nonexistent until the EEC digests its new membership. Beyond that time, the shape

123. Thus, in explaining why the United States had been unable to remove or relax certain illegal restrictions on dairy products, a United States delegate stated that the restrictions would have been removed if 1953 production had remained at 1952 levels, but that 1953 had been a "bad year." Other delegations were full of suggestions for reducing production and increasing consumption the following year. GATT Doc. SR.8/11 (1953).

It stands to reason that the draftsmen must have had some such forecast in mind, for it is impossible to believe that they meant their governments to buy up large quantities of imports. It must be recalled, in this connection, that, at least in the United States, the pre-war experience with price-support programs gave no real evidence of what was going to happen.

124. The EEC situation differs from the earlier United States surpluses, for the EEC has as yet not adopted a genuine policy of production controls. See generally B. BERNSTON, O. GOOLSBY & C. NOHRE, *THE EUROPEAN COMMUNITY'S COMMON AGRICULTURAL POLICY* (Econ. Research Service, U.S. Dep't of Agriculture, 1969).

125. For a discussion of the evolution of Kennedy Round negotiating demands along these lines, see E. PREEG, *supra* note 48, at 71-76, 144-58; Albregts & van de Gevel, *Negotiating Techniques and Issues in the Kennedy Round*, in *ECONOMIC RELATIONS AFTER THE KENNEDY ROUND* 36-45 (F. von Geusau ed. 1969).

The Kennedy Round negotiations finally produced the International Grains Arrangement, Nov. 30, 1967, [1967] 19 U.S.T. 5499, T.I.A.S. No. 6537, which contained an agreement to maintain prices and a program for food aid designed to absorb surpluses. The price maintenance scheme broke down, and in early 1971 most of the member countries negotiated the International Wheat Agreement, 1971, to replace it. The new agreement abandons the price maintenance features, substituting merely an obligation to consult; the food aid provisions have also been narrowed. See *INTERNATIONAL WHEAT AGREEMENT*, 1971, S. Doc. EXEC.-F, 92nd Cong. 1st Sess. (1971) (Presidential Message of Transmittal).

A similar price-maintenance agreement has been negotiated for dairy products. GATT, 17th Supp. BISD 5, 59 (1970).

of agricultural trade will depend upon the effects of structural adjustments, planned or otherwise, on the volume and relative efficiency of production in the major producing countries. If, as seems likely, governments intend to continue such programs until structural adjustments make local agriculture "competitive," the situation may never improve. There will simply be fewer farmers producing the same or greater surpluses at lower prices, a situation which will still require isolation of local markets and artificially managed surplus disposal. On the whole, the most likely focus of international cooperation for the foreseeable future will be market management rather than trade.

(2) *Restrictions on Industrial Trade.* Despite continued insistence on the proposition that trade liberalization cannot move forward on the industrial front alone, trade in industrial products has been the mainstay of GATT activity and its principal claim to success. The recent Kennedy Round negotiations achieved substantial reductions in developed country tariffs on industrial products, but did relatively little to liberalize agricultural and developing country trade.¹²⁶ The effectiveness of GATT rules generally is also highest in this area. Both the EEC and EFTA, for example, managed to achieve substantial compliance with GATT Article XXIV as far as industrial trade was concerned; their performance on agricultural trade was near zero.¹²⁷

The present consensus on the rules governing industrial trade is weakened, though far from complete collapse. Stresses of at least three different kinds can be identified. First, there has been a general intensification in international competition, caused on the one hand by the recovery of the European and Japanese economies, and on the other by a general reduction in trade barriers as tariffs have gone down and balance-of-payments quotas have been removed. The increased pressure on domestic industry is creating politically more powerful demands for protection, most visibly in the United States but in Europe as well.¹²⁸ A collateral development that has further skewed

126. See, e.g., E. PREEG, *supra* note 48, at 256-60, 264-71. Both the source cited and J. EVANS, *supra* note 3, are excellent detailed studies of the Kennedy Round negotiations from beginning to end.

127. In EFTA (European Free Trade Association), agriculture was simply excluded from the free trade area. See GATT, 9th Supp. BISD 70, 83 (1960). The EEC included agriculture, but the Common Agricultural Policy has called for a significant increase of trade barriers, in effect removing much of the EEC market from world trade. See BERNITSON ET AL., *supra* note 124.

128. The tenor of the trade legislation presently before the United States Congress is the subject of a Note in this issue, *infra* p. 1418. Although nothing quite so dramatic is occurring in the EEC, opponents of the protectionist swing in the United States warn that such forces are mounting in Europe and will be released given the excuse. A factor

the balance in the United States is the growing tendency of efficient U.S. industries to invest abroad rather than to export, thereby depriving GATT forces of potential allies.¹²⁹

The lesson, it would appear, is that the GATT victories before 1960 took place in a more favorable economic climate, and are not, therefore, entirely convincing as a demonstration of what is possible now. Even the success of the Kennedy Round in 1967 is a little misleading, for it was in many ways a product of conditions five years before. Although the most recent manifestations of the new protectionism may have been in part the product of monetary disequilibrium, changes in exchange rates will not turn back the clock to the early 1960s. There is, accordingly, a need to reappraise the present GATT standards concerning the degree of competition that is tolerable, and the measures to be taken when it exceeds those limits. United States trade policy officials have already suggested revising the domestic law counterpart of GATT Article XIX, which defines when a government may raise trade barriers to prevent "serious injury."¹³⁰

Second, there has been a marked increase in recent years in a particular type of import competition which seems not to fit very well within the general framework of GATT rules. It might be called "Made in Japan" competition¹³¹—goods which can be imported at prices far below the most competitive domestic prices, and in quantities large enough to seize a meaningful share of the domestic market. Trade in textiles is the most prominent case in point, but the increasing flow of

which lends credibility to these concerns is that membership inside a large continental market cannot help but alter to some extent the traditional interest in free external trade on the part of small mercantile nations such as the Netherlands. The Community's policy toward discrimination, *see pp. 1360-64 infra*, is one sign that changes of this kind are quite possible.

129. Consider, for example, the testimony of a chemical industry spokesman that reduction in present trade barriers will force the United States industry to move its production for the United States market "off-shore" in order to compete with foreign producers. *Hearings, supra* note 43, at 4559. If cost differentials would really justify such a move to serve the United States market, a fortiori they will justify investing rather than exporting to compete in foreign markets, assuming that the industry has sufficient capital and that the foreign market is large enough. Under such circumstances, reduction in foreign tariffs simply has no appeal as an inducement to support reductions in the United States tariff.

130. SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, *FUTURE UNITED STATES FOREIGN TRADE POLICY* 41-54 (1969) (the "Roth Report"). The recommendations on the escape clause were submitted to Congress. *See Hearings on Tariff and Trade Proposals, supra* note 44, at 21-22. The Congressional response was to propose an escape clause substantially more trade-restricting. H.R. 20, 92d Cong., 1st Sess. § 111 (1971).

The Roth Report presents a complete overview of U.S. trade policy from the GATT point of view, the most recent government statement of its kind. It is, however, the product of the previous administration.

131. The idiom is becoming obsolete, for in some areas Japan itself is now being challenged by newer Japans such as Korea and Taiwan. *See N.Y. Times*, Mar. 10, 1971, at 59, col. 3 (city ed.) (Competition in textiles).

capital and technology to low wage areas makes it likely that the phenomenon will become far more general.

The GATT draftsmen seem not to have anticipated this type of competition when writing the rules. Although low wage countries were certainly known and talked about, the conventional answer until very recently has been that the technology of high wage countries made unit labor costs comparable.¹³² It was assumed, therefore, that at least in the industrial sector tariffs alone could provide the sort of cushion needed to permit local producers to "adjust" either by becoming more efficient or by shifting gradually to other more efficient lines of production.¹³³ Tariffs alone, however, cannot deal with the seemingly bottomless price flexibility this new competition seems to involve, unless they are either changed with great frequency or set at absolutely prohibitory levels to begin with. Moreover, the very large price differences seem to invalidate the assumption that domestic industry can be expected to "adjust" gradually. The more common assumption has been that such imports will swallow up the domestic market just as fast as the exporters' capacity allows.

The GATT has already moved some distance toward recognizing this new phenomenon. As a prelude to the Long Term Arrangement on Cotton Textiles (LTA),¹³⁴ the Contracting Parties adopted a Decision defining a new kind of trade problem called "market disruption."¹³⁵ The Decision proposed no solutions, but the LTA, a separate ad hoc agreement outside the GATT, presented the basic idea—quantitative controls on "disruptive" trade in exchange for a guaranteed annual increase in the amount of imports accepted, the whole scheme negotiated multilaterally to assure roughly equal rates of absorption by the various importing countries.¹³⁶

132. See, e.g., WILCOX, *supra* note 30, at 191. The same view was advanced in support of the Kennedy Round negotiations, H.R. REP. NO. 1818, 87th Cong., 2d Sess. 7 (1962).

133. GATT Article XIX allows the use of quantitative restrictions as an escape clause measure, but the exception, hotly debated in the GATT/ITO negotiations, came coupled with an assurance that resort to such restrictions would be the exception. See BROWN, *supra* note 9, at 89-90.

134. GATT, 11th Supp. BISD 25 (1962).

135. GATT, 9th Supp. BISD 26 (1960).

136. Technically, the feature of the LTA which distinguishes it most from past practice is the fact that controls were discriminatory, being applied only to the low-price imports causing the most trouble. Indeed, were it not for this feature, it would probably have been possible to square the LTA with GATT Article XIX (assuming that there was the requisite injury). It is my view that the discrimination is merely incidental to the larger break in GATT policy represented by this agreement, namely, the decision to impose a long-term order on the world market in this product. Indeed, although discriminatory in form, the agreement, and the other voluntary arrangements like it, merely does what any quantitative control program has to do—carve up the market into fair shares. The absence of control on smaller or higher-price suppliers represents mainly

As suggested above, the stated objectives of the LTA approach are not so very far from the real assumptions—the rather cautious gradualism—which hide beneath the GATT's general policy of permitting only tariff controls. Unfortunately, the necessity of making these assumptions explicit makes it difficult to achieve as much trade liberalization as when using tariffs alone. The nice thing about the tariff system is that the government becomes involved only to the extent of setting tariffs. Market forces determine how much of the market is taken by imports, subject only to further indirect intervention after the fact. The LTA approach requires the government to take responsibility for deciding just how much of the market will be "given away," for with prices as they are it is simply conceded that imports will seize whatever share is opened to them.¹³⁷ Responses to date from importing countries indicate that governments do not feel they can permit any real growth under these circumstances.¹³⁸ The resort to "voluntary" quotas by the exporter has proved increasingly attractive for this reason, but even here the need to mention numbers exposes government officials to some direct responsibility for accepting any substantial trade increase over time.¹³⁹

A larger problem is the fact that "market disruption" is not an easily containable exception. There seems to be no real economic distinction

a judgment that their present share of the market, without controls, is fair. If they move too fast, they too will be put under controls. Like any such pie-cutting, of course, whether or not discriminatory in form, the slicing usually bears little relation to comparative advantage.

137. It is sometimes pointed out, in opposition to this assumption, that exporters seldom fill their quotas under the LTA. The shortfall, however, is almost always the product of the commercial inflexibility imposed by the quota, particularly the segmentation of the quota into narrow product categories, each with its own quantity limit, which prevents exporters from being able to respond to typically sudden bursts of demand for particular products. The real significance of the shortfalls is that nominal quota limits are not even as generous as they appear. One should not be surprised, therefore, to see quota proponents spending as much energy on product segmentation as on the overall level of the quota; indeed, there are considerable cosmetic advantages to the former.

138. The most palatable formula seems to be to freeze domestic and foreign shares of the market at something near present shares, and thereafter to allow each to grow as the market expands. The legislative quota for textiles and shoes in the trade bill presently pending is actually much lower, calling for an initial cutback to 1967-69 import levels, with growth thereafter at a maximum of five per cent per year, a rate somewhat less than the 1961-1970 growth rate of the United States market as a whole. H.R. 20, 92d Cong., 1st Sess. § 201 (1971); see *Hearings on Tariff and Trade Proposals*, *supra* note 44, at 1338. Given the expectation that this legislative formula would be superseded by voluntary quotas, see note 51 *supra*, it is fair to conclude that the tolerable level was in fact somewhat more generous. The voluntary quotas negotiated by Chairman Mills, *id.*, were reported to have used 1971 trade as the base, with a growth factor of six per cent, and, significantly, very broad product categories. *Author's note*: The full details of the recently concluded agreements, note 51 *supra*, are not yet available. The agreements appear to be a compromise, the significant change being narrower product categories.

Five per cent was also the basic growth rate provided for new quotas under the LTA. GATT, 11th Supp. BISD 25, 29 (1962).

139. See notes 58, 138 *supra*.

between "disruptive" trade and other kinds of competition, the main identifying characteristic of the former being simply that conventional tariff controls cannot produce politically acceptable results. This means, of course, that every industry suffering "too much" competition will claim "market disruption" as a justification for quantitative controls. In addition, the concept appears to encourage some to argue that very low prices are in themselves a justification for action, regardless of the impact on domestic industry.¹⁴⁰

Can these problems be met by defining new substantive standards within GATT? It must be remembered, of course, that the present rules themselves have some impact, for by characterizing something like the LTA as an illegal measure the rules force such proposals to be treated as exceptions requiring special justification.¹⁴¹ One further thing that could be done would be to require consultations on the facts, *à la* GABB, before action is taken. As for substantive standards themselves, it is less certain that governments will be able to say anything very useful on the critical issues of "when" and "how much."¹⁴² On the other hand, the fact that most governments seem concerned about the need to confine this new beast is perhaps encouragement enough to make that effort.

The third of the factors affecting the consensus on industrial trade is a matter of under-control rather than over-control. The General Agreement was designed something like a container with pressure valves, closing off the use of certain trade barriers entirely and permitting pressures for protection to be relieved only through controlled

140. The argument that low cost competition, particularly low wages, is unfair is worthy of a detailed study of its own. Regardless of the ultimate merits of the case, it presents in acute form the need to discuss the actual normative basis of trade policy and to understand counterarguments in the same terms, for to the extent certain kinds of competition can be labeled "unfair," there will be less need to justify countermeasures in terms of injurious impact *per se*.

141. *But see* the argument of Secretary of Commerce Stans that United States quotas on textiles would not be in violation of GATT (presumably because they would qualify under Article XIX), and that voluntary restraints accepted by exporters under the threat of such legislation would not even require the compensation provided in Article XIX. *Hearings on Tariff and Trade Proposals*, *supra* note 44, at 4430. Here again, it would be a mistake simply to dismiss the arguments out of hand. To the extent notions of gradualism become more and more explicit as part of the total package of expectations behind trade obligations, the more directly one has to deal with the argument that skyrocketing exports are really *not* a basic part of the deal. This is not to say, of course, that Secretary Stans argument was not in error on other grounds, such as the facts justifying restriction in the first place.

142. GATT Article XIX lays down several causal conditions, but the only thing it says about the degree of injury is "serious." For one application of these standards, see Appendix, Item A-9. In applying the similar provisions of United States law, it may be noted that negative decisions by the Tariff Commission have generally rested on the cause factor rather than the conclusion that injury was not serious. *See Metzger, supra* note 54, at 365-66.

tariff barriers. The container has proved a good deal leakier than expected. To some extent, new holes (I refuse to say "loopholes") are being searched for and manipulated by industries seeking escape from the consequences of reduced tariffs. But many have been there for years, attracting notice now simply because the conventional trade barriers standing in front of them have been removed.

The list of things involved is long and varied, many being only tangentially related to conventional trade policy. The issue on which United States industry is making the largest outcry at the moment is tax policy, and the GATT rules pertaining thereto. Most readers will instinctively grasp the eminent neutrality of a rule which allows the Federal government to apply the same confiscatory alcoholic beverage tax to scotch as well as bourbon. Informed opinion has it, however, that applying this rule to the various forms of general value-added taxes prevalent in Europe, as the GATT expressly allows, may have a protective effect favoring European producers.¹⁴³ Discussions so far have succeeded only in clarifying the reasons why the problem seems insoluble.¹⁴⁴

The United States has come in for its share of criticism. It may be good safety engineering to require on-site inspection during the manufacture of compressed gas cylinders, but the requirement does impede trade in the absence of foreign-based inspectors. Safety and environmental standards for automobiles present another fertile field for controversy, and the environmental concern currently sweeping the United States could well expand the problem significantly.¹⁴⁵

Another type of problem should be added to this list. All governments adhering to GATT have done so through a standard protocol

143. See OECD, REPORT ON TAX ADJUSTMENTS APPLIED TO EXPORTS AND IMPORTS IN OECD MEMBER COUNTRIES 71-92 (1968); DAM, *supra* note 13, at 210-21; JACKSON, *supra* note 14, at 294-304.

144. See, e.g., GATT Doc. L/3009 (1968). The difficulty is that while most participants will admit, some of them grudgingly, that value-added taxes are not fully passed forward in all circumstances and that direct income taxes are not always fully absorbed by the taxpayer, there seems to be no prospect at all of being able to measure the deviation from the 100 per cent assumed by the GATT rules. There would appear to be no justification at all for the proposal, commonly advanced by United States business interests, that border adjustments for the value-added tax be abolished entirely. The problem, to the extent it exists, is one of much smaller degree. Though the present United States government position is unclear, the qualified nature of the problem was certainly recognized in the earlier United States position—that governments using border tax adjustments should agree to raise and lower the border taxes as a balance-of-payments adjustment device.

145. See generally Kelly, *Nontariff Barriers*, in STUDIES IN TRADE LIBERALIZATION 265-314 (B. Balassa ed. 1967); Wilson, *Nontariff Barriers to International Trade: A Survey of Current Problems*, 18 J. PUB. L. 403 (1969). It may be added that the United States has no monopoly on technical and safety standards. See, e.g., *Hearings on Tariff and Trade Proposals*, *supra* note 44, at 564 (Greek auto safety standards).

which exempts existing mandatory legislation from GATT rules. Thus, for example, the United States may legally apply countervailing duties under a pre-1947 law which requires no finding of injury, contrary to the requirements of GATT Article VI.¹⁴⁶ As tariffs and other barriers have gone down, the impact of such practices has become more visible, adding to the irritation caused by the problems mentioned above.¹⁴⁷

The effect of these newly prominent forms of trade restriction has been to create a sense of imbalance, or non-reciprocity, about the GATT controls which do exist. Why observe a ban on quantitative restrictions if other countries will be allowed to achieve the very same effects "legally" by means of safety requirements, or through the protocol reservation? The problem is one which will grow worse if nothing is done, for each violation justified by the present imbalance simply adds another excuse in succeeding cases.

The GATT has recently compiled a monumental survey of nontariff barriers as a prelude to further negotiation.¹⁴⁸ The present design is to explore the various bases on which governments might be able to negotiate the removal of these barriers, individually or in related groups. Many of the issues being confronted are more difficult than the usual trade policy issue; governments will not, for example, accept international determination of whether Thalidomide is a safe product. The work so far, however, has given no reason to suppose that satisfactory solutions cannot be achieved given the political will to do so.¹⁴⁹

(3) *Discrimination—The Most-Favored-Nation Rule.* In weighing the possibilities of negotiating a new GATT code, one final aspect of the GATT consensus assumes a dominant importance. There has been a serious breakdown of consensus over the pivotal question of discrimination.

The nature of the breakdown is rather complicated, for the original consensus was much more qualified than is commonly supposed. From

146. 19 U.S.C. § 1303 (1964). On the reach of the mandatory legislation reservation generally, see JACKSON, *supra* note 14, at 108-10.

147. There has been a good deal of pressure lately, for example, to negotiate a code on Countervailing Duties to parallel the 1967 Antidumping Code. See GATT Docs. SR.24/13, -14, -19 (1967). The prevalence of Protocol-justified restrictions generally was one of the reasons often cited in refusing to accede to the New Zealand proposal to regularize residual restrictions, discussed p. 1345 *supra*.

148. See GATT, 15th Supp. BISD 69 (1967); *id.* at 16th Supp. 12, 14 (1968).

149. Political will is currently lacking due to the apparent unwillingness of the EEC to tackle such problems before the United Kingdom merger is completed. Although the United States has sometimes made more positive noises, there is an indisposition to believe that the United States Congress is in a mood to grant any substantial authority either, a situation which is not likely to change until the United States Executive regains its grip on trade policy generally. Notwithstanding, work labeled "preparatory" has been going on in some intensity, to the apparent satisfaction of the officials involved.

an economic point of view, discrimination between one foreign country and another is objectionable because it adds yet another distortion to international trade,¹⁵⁰ a distortion more objectionable than national tariffs because it increases the complexity of trade barriers and also makes it more difficult to negotiate their reduction.¹⁵¹ The economic objection itself, however, has never been treated as an absolute. Existing preferential systems such as the Commonwealth Preference and the Franc Zone Preference were excepted from the MFN rule at the outset, subject to the requirement that 1947 margins of preference not be increased.¹⁵² The reason advanced for the exception was the need to avoid sudden dislocation of established economic relationships, although the refusal to promise even a very gradual phasing out of these arrangements makes it clear that maintenance of existing political ties was also a major factor, recognized and accepted.¹⁵³ In addition, discrimination has not been foreclosed as an answer to particularly "difficult" problems of import competition. The process of dismantling European balance of payments restrictions began with liberalization extended first only to Europe, and then more gradually to the rest of the world.¹⁵⁴

The GATT has endeavored to contain these exceptions, however, to specific transactions limited to a particular setting. The aversion to open-ended discrimination has been quite strong, for, if governments had the power to discriminate at will, the entire GATT structure would be unworkable. It would be altogether impossible to bargain about tariffs, for tariff reductions would have no value if tomorrow a still lower tariff would be granted to the products of some third

150. Discrimination will not necessarily have this effect, to be sure, if it favors the most efficient producer, the only producer, or a total nonproducer. Occasionally GATT has encountered discrimination which is arguably of this kind, imposed for reasons other than economic favoritism. *E.g.*, the United States-Canada Auto Parts Agreement, *supra* note 47, and the United Kingdom Article I waivers, *supra* note 86.

151. The generally greater hostility toward the economic distortions caused by discrimination may also be due, in part, to a feeling that, while protection of local industries is a political necessity incumbent upon all governments, protection of *another* country's industries is not.

152. GATT Article I:2-4.

153. See GARDNER, *supra* note 8, at 151-53.

154. See KOCK, *supra* note 30, at 115-16, 142-45. Other examples, resting on one or more of the above reasons, would include GATT Article XXIV:3 on frontier traffic, Article XXIV:11 allowing India and Pakistan to discriminate in favor of each other after they had been made separate customs territories in the 1947 partition, and Article XXXV allowing countries not to enter relations with new GATT members, an exception sometimes used for political reasons (*e.g.*, India v. South Africa) and sometimes for economic reasons (*e.g.*, much of the world v. Japan). For the best work on GATT theory and practice, see G. PATTERSON, *DISCRIMINATION IN INTERNATIONAL TRADE, THE POLICY ISSUES 1945-1965* (1966).

country.¹⁵⁵ Moreover, the ability to dispense discriminatory trade advantages would almost certainly open trade policy to manipulation for political purposes, a process which, once begun by one country, would draw similar responses from other countries and would eventually produce a network of self-cancelling distortions immune from conventional commercial diplomacy.

The GATT rules governing customs unions fit into this general pattern. As Professor Dam and others have shown, customs unions sometimes result in a net distortion of trade.¹⁵⁶ The GATT nevertheless permits customs unions. Although there may have been some misunderstanding about trade effects, I would argue that the GATT rule rested mainly on a judgment that whatever trade distortion there might be was justified by other factors. The countervailing concern was one of parity. One could object to the trade distortion caused by a customs union only if one was prepared to accept the status quo prior to the customs union as a legitimate base from which to measure. Given the accidents of political boundaries in 1947, however, that was not possible. It could not be argued, for example, that the distortion caused by enclosing Europe in a single customs territory was any worse than the distortions already caused by the existence of a single customs territory for the United States. One might lament the new trade distortion, but the fair answer was to demand equal improvement in both the old and new together.

The rules of GATT Article XXIV are really concerned with what happens after the basic demand for larger regional units has been conceded. Here again the rules represent other than economic considerations. As Professor Dam has shown, the rule requiring total elimination of internal barriers causes greater trade distortion than would result if GATT allowed economic union in selected markets where union would be trade creating.¹⁵⁷ The rule represents a judgment, I believe, that such selective union could never be controlled—that all the political forces surrounding a customs union would unite to compel selection of exactly the opposite markets, those in which

155. It should be noted that Article I requires MFN treatment only for other contracting parties. Indeed, at one point in the GATT/ITO negotiations the United States, otherwise the most vocal proponent of MFN, proposed that nonmembers be *excluded* from the benefits of the Agreement. SUGGESTED CHARTER, *supra* note 27, art. 31.

156. See Dam, *supra* note 117. For the reasons which follow, I believe that the economic analysis, though certainly correct, is misleading to the extent it suggests that failure to achieve net "trade creation" is a defeat for the original design.

157. *Id.*

the gain occurred at the expense of outsiders. Further distortion was accepted as the price of ensuring that the concession to "economic union" did not become a charter for free-floating discrimination.

Until 1960 or so, there seems to have been agreement that the much-qualified GATT rules on discrimination still made sense, and that, as understood, they were being observed reasonably well. There have been two significant changes since then. The first, mentioned earlier, concerns the agreement by the developed countries to give some form of tariff preference to developing countries. By itself, this change in attitude would probably not have precipitated a major change in developed country policy generally, for, after some hesitation, it has been agreed that developed countries will grant preferences in a nondiscriminatory fashion to all developing countries and that they will not bargain for any reciprocal advantages in return.¹⁵⁸ Preferences should take their place, therefore, as another fixed and containable exception to the general rule.

The tremors created by the development crisis have been overshadowed by a second change in policy which, although it has some overtones of development aid, goes much further. The formation of the EEC has been accompanied by a proliferation of side agreements which establish reciprocal preferences between the EEC and most of its neighbors. Following an initial agreement with former French African colonies, under the guise of a nascent Article XXIV free trade area, a number of even less tangible economic unions have been negotiated with other African countries and with Mediterranean neighbors from Spain to Israel.¹⁵⁹ In addition, it is likely that various forms of "special

158. See note 118 *supra*. For an excellent account of the struggles leading up to this position, see Note, *Trade Preferences for Developing Countries*, 20 STAN. L. REV. 1150 (1968). In the one application of the UNCTAD preferences plan, the EEC generally followed this principle toward most of the world, but there were significant exceptions. Several Mediterranean countries were excluded *temporarily*, most likely for a variety of reasons stretching from fear of import competition to questions of politics. Cuba and Taiwan were the other countries excluded for the moment. See 2 CCH COMM. MKT. REP. ¶ 9425 (1971).

159. Tabulations of the EEC's various associations rapidly become obsolete due to the increasing frequency with which they are negotiated. At this writing, an agreement of some kind has been negotiated (though not necessarily ratified) with all of the following:

- (a) Dependencies of member states
- (b) Eighteen African states, former dependencies (Yaounde)
- (c) Greece
- (d) Turkey
- (e) Nigeria
- (f) Morocco and Tunisia
- (g) Spain
- (h) Israel
- (i) the East African Common Market (Kenya, Uganda and Tanzania)
- (j) Malta.

association" will be used to deal with whatever remaining European countries choose not to enter full EEC membership, and with various Commonwealth problems incident to pending British membership.¹⁶⁰

The initial impetus behind this wave of discrimination seems to have been concern for dislocation of existing trade patterns—the need to accommodate both the franc zone preferences and also certain Mediterranean trade patterns affected by the formation of the EEC. Unfortunately, the discriminatory measures taken to deal with some of these early problems created other dislocations in turn, and soon almost every country in the area was claiming some sort of dislocation.¹⁶¹

From the beginning, however, these arrangements involved a good deal more than trade dislocation. Almost all the existing arrangements have been with poorer countries, and thus have lent themselves to more extended discrimination on grounds of economic development. Moreover, the EEC has used these arrangements to further its own "economic development." Reverse preferences for EEC products invariably accompany these arrangements, despite the fact that, except in the case of former colonial preferences, there has been no reverse dislocation for EEC producers. Finally, agreements such as the one recently concluded with Malta suggest that political and military considerations may have played more than a small part in shaping the network of Mediterranean arrangements.¹⁶² Political considerations of another kind have been generated by the momentum of earlier arrangements, as, for example, the Egyptian request after the EEC had made an agreement with Israel.

Requests being considered include Cyprus, the United Arab Republic, Lebanon, Libya, Switzerland, Austria, and Sweden. 1 CGH COMM. MKT. REP. ¶¶ 5342, 5344, 5346; 2 *id.* at ¶¶ 9349, 9376, 9403 and 9407 (1971). For GATT reviews of some of the earlier arrangements, see GATT, 6th Supp. BISD 89 (1957) (Association of Overseas Countries and Territories); *id.* at 11th Supp. 149 (1962) (Greece); *id.* at 13th Supp. 59 (1965) (Turkey); and *id.* at 14th Supp. 100 (1966) (Association of African and Malagasy States).

160. See Dale, *Principle of Favored Nation Laid to Rest*, N.Y. Times, May 30, 1971, § F, at 7, col. 5 (city ed.).

161. An example of the initial dislocation would have been those producers competing, say, with Italian agricultural products in the other EEC markets, for whom movement of Italian producers inside the EEC customs wall created a new competitive disadvantage. Subsequent dislocations were those such as Nigeria's disadvantage when French African States producing competitive products were given preferential entry to the non-French EEC markets. Though the rest of the world also suffered—and was expected to suffer—from the formation of the EEC, the African and Mediterranean dislocations were arguably more serious because the countries involved were relatively poor and depended on just a few products for vitally needed export earnings. Article XXIV theory, not having contemplated any thing quite so large as the EEC, may have rested on inadequate assumptions about the problem of adjustment for such countries.

162. According to one commentary, Malta's trade was not in the least affected by the formation of the EEC, nor was there any other similar economic justification for the association. *L'association de Malta avec la C.E.E.*, 1971 REVUE DU MARCHÉ COMMUN, 181 (May, 1971).

The GATT reaction to all this has been one of increasingly silent frustration. After a vigorous legal battle over the initial franc zone agreement, the GATT has had less and less to say about each succeeding agreement, and the agreements themselves have made less and less pretense of complying. The political factor has probably had a good deal to do with the silence. Having swallowed the EEC preferences to former colonies, the United States could hardly do less for its real friends, such as Turkey, Greece and Nigeria. Although the United States has recently taken a rather vigorous stand against the discriminatory arrangements on citrus products in some of the newer agreements, it is by now much too late to attack the general practice itself in individual cases, for the situation on both sides has already become a classic example of the political snarl which develops once discrimination breaks loose.¹⁶³

The seeming collapse of the MFN rule is probably the single most important cause of the present day pessimism about GATT substantive rules. It is also the largest obstacle to renegotiation, for no other rules could have much impact if the EEC practice were generalized. Indeed, it would be pointless even to consider renegotiating the GATT rules until some long-term resolution of this situation can be agreed upon.

Long-term prospects are a mystery, even, I suspect, to the EEC itself. Despite talk of a greater European economy, it would appear that the

163. The reports cited in note 159 *supra* do not accurately reflect the increasing formalism and sense of hopelessness with which the legal arguments mentioned therein are advanced. A much better indication is the fact that GATT criticism has done nothing to slow the rush to "associate." The association agreements, moreover, have made less and less effort to comply with GATT Article XXIV; the agreements with Spain and Israel do not even purport to be part of an Article XXIV arrangement.

The course of the recent argument over citrus preferences illustrates both the existing momentum and the way it feeds itself. Preferences to Spain and Israel were originally put forward without the usual free trade area cover, in the form of an EEC request for a waiver from Article I. The waiver request was withdrawn when a working party examining the request came out badly divided over its justification. See GATT Doc. L/3281 (1969) (working party report). The preference then surfaced again as part of association agreements with Spain, Israel, Tunisia and Morocco—each advanced as a nascent free trade area. Under some pressure from the Congress, the United States attacked these arrangements as well, claiming that they do not comply with GATT Article XXIV. The claim itself is hardly surprising; what is significant is that someone is actually pressing it. The United States has convened Article XXII consultations, see notes 101-03 *supra*, and has even mentioned advancing to Article XXIII. *Hearings on Citrus Exports Before the Senate Agriculture Committee's Subcommittee on Agricultural Exports*, 92nd Cong., 1st Sess. 117-24 (Mar. 18, 1971). In response, the EEC recently proposed a reduction in the MFN rate during the peak season for United States exports, the effect being to reduce the absolute margin of discrimination during that period. The manipulation of the lower MFN rate to confine its applicability to the United States export season is, of course, another form of discrimination, a nice example of the proposition that the easiest answer to the trade problems of discrimination is to discriminate some more. As of July, 1971, the United States was considering whether it would accept the EEC action as a satisfactory answer.

EEC's "policy" has really been a series of ad hoc responses to various pressures. More of the same patchwork discrimination seems to be in store before the final rounding out of the Community is completed. It will not be very easy to turn things around after that, although there is already some indication that the EEC itself may want to try.¹⁶⁴ The first objective must be to stabilize the situation by defining a coherent long-term policy to replace the present process of uncontrolled action-reaction. Whether a stabilized policy will meet the problem depends, of course, on what it is. It is possible that a fixed relationship linking all of Western Europe, and possibly Southern Europe as well, might be acceptable to outsiders as a natural consequence of economic gravity, particularly if the downward trend of external tariffs in the industrial sector can be made to continue. On the other hand, an EEC policy which sought to maintain more extensive commercial and political privileges could well break apart the present GATT system.

C. *Balance-of-Payments Exceptions*

The substantive policy issues discussed so far have related to the rules of conventional trade policy which constitute the core of the GATT's substantive code. All of these rules, however, speak to a situation in which member governments are in tolerable balance-of-payments equilibrium. When monetary disequilibrium occurs, the GATT code itself provides for an overriding exception allowing governments to impose comprehensive trade controls to reduce imports by the needed amount. Although the problems of monetary disequilibrium are beyond the scope of this study, a survey of the prospects for renegotiation requires a brief description of where these balance-of-payments rules now stand.

The requirements of the GATT rule are rapidly becoming inoperative, but the underlying consensus still seems to be relatively sound. Ar-

164. In May 1970, the Committee on External Relations of the European Parliament issued a report criticizing the Community's halting development of a common external commercial policy in general ("*timidement et incomplètement*"), pointing to the flood of preferential arrangements as one such problem. [1970-71] EUR. PARL. DOCS., No. 64, at 3, 12 (1970). In April 1970, the Commission of the EEC issued a tentative statement of policy reviewing the many preferential arrangements and concluding with a recommendation that consideration be given to the possibility of phasing out certain of the tariff preferences in favor of other devices such as regional commodity agreements and technical-financial assistance. AGENCE EUROPE DOCS., No. 572, April 27, 1970.

Except for the contemplated association agreements with developed countries of Western Europe such as Switzerland and Austria, it would seem that all of the existing and contemplated "associates" are countries that would qualify as recipients of the UNCTAD's generalized preferences, thus offering a possible substitute for the association agreement preferences of manufacturers and semi-manufacturers. Agricultural commodities, not covered by the preference scheme, would present a separate problem. Before anything else, however, the EEC has to agree to give up its own reciprocal preferences. At the moment, that is the heart of the problem.

title XII contains two central provisions: (1) It allows governments to impose quantitative restrictions (but *not* tariff surcharges) to control the volume of trade in times of serious disequilibrium, and (2) it requires that the fact and degree of disequilibrium be certified by means of a formal determination of the International Monetary Fund. Neither part of the rule is being applied these days in the case of monetary disequilibrium of the major GATT members. The requirement of formal IMF certification has fallen because, when a major currency is in trouble, the last thing the government trying to save that currency wants is an authoritative declaration that the trouble is really as bad as speculators and opposition politicians think it is. The requirement that governments use only quantitative restrictions has fallen primarily because earlier fears about the difficulty of removing "temporary" surcharges have been proved wrong. Consequently, since about 1960, GATT governments have been using different instruments to achieve roughly the same objectives. The standard practice is now the sudden imposition of a surcharge followed by consultations in which the government's situation, its policy and its progress are reviewed quietly but intensively. So far, there seems to have been no great difficulty in reaching agreement on the monetary issues informally, in large part because the GATT proceedings are paralleled by extensive IMF/Group-of-ten discussions. Nor, significantly, has there been difficulty in getting rid of the developed country surcharges once the short-term problems are corrected.¹⁶⁵

The GATT rules plainly need renegotiation. What they should say will depend, of course, on what if any changes are made in the world monetary structure in the interim. Assuming that the world will continue to live with something like the present system of fixed exchange rates, present practice should provide a ready starting point on which to fashion new rules and procedures.

3. *The Present Political Environment*

The preceding survey of substantive developments should serve to

165. Surcharges have been used by Canada, the United Kingdom and France. *See* GATT, 11th Supp. BISD 57 (1962); *id.* at 15th Supp. 113 (1966); *id.* at 16th Supp. 57, 65 (1968). All have been removed.

A large number of developing countries have turned to surcharges as an alternative to quotas. In 1965-66 an effort was made to draft an amendment to GATT Article XVIII that would have authorized this practice, for developing countries alone. Despite agreement on the general merits of the proposal, the legal drafting group uncovered a number of unanticipated issues trying to translate the present restrictions and criteria of Articles XII and XVIII into terms applicable to a money charge. The project was shelved. *See* GATT, 14th Supp. BISD 129, 141 (1966). For a discussion of the pros and cons of such an amendment generally, see JACKSON, *supra* note 14, at 711-14.

explain the stresses which upset the positive momentum of the first decade. It is not, however, a satisfactory explanation of the direction taken since then. The deterioration of an existing set of rules is one thing; the decision not to rebuild them is another. The latter rests, I believe, on other factors which have changed the way many government officials think about the role of GATT and GATT law in international trade relations.

The early GATT benefited from several transitory factors which contributed to the willingness of governments to work within the framework of GATT's substantive rules. One was a general desire that the GATT not "fail" in a conspicuous manner. Whatever reservations the founding governments may have had about GATT's ultimate role in the world, the GATT and its substantive code were at the time the sole embodiment of the world's commitment to turn away from the chaotic trade policies of the 1930's. Failure of the GATT's legal system at the very outset would have been interpreted by all as a rejection of that larger commitment. The concern was more than symbolic. With the 1930s fresh in everyone's mind, there was a good reason to fear that the alternative to GATT rules would in fact be a return to the destructive autarky which characterized the earlier period.

Experience has brought greater wisdom, if one may call it that, about the importance of the GATT legal system to international trade relations. The blind autarky of the 1930's has not reappeared, for most developed country governments seem to display a fundamental appreciation of the need for some self-restraint, with or without formal obligations. Although governments are not yet ready to dispense with codes and coda altogether—indeed, they continue to negotiate new substantive agreements all the time—they now seem confident that the world will not fall apart if these agreements fail.

This change in attitudes has undoubtedly been facilitated by changes in the government personnel dealing with GATT affairs. For the better part of the first decade, GATT meetings resembled a reunion of the GATT/ITO draftsmen themselves. Failure of the code would have meant a personal failure to many of these officials, and violation of rules they had helped to write could not help being personally embarrassing. The present generation of government officials have come to GATT with a more open mind.

Another factor which greatly aided the early GATT was the quite fragmented composition of its membership during this period. Except for the United States, the other major participants were all relatively small countries, none wielding very much political or economic influ-

ence when measured against the rest of the membership.¹⁶⁶ Countries in this situation could see a reciprocal advantage in conducting trade policy through a framework of substantive legal obligations. Among themselves, a system of legal restraints would produce about the same results as would the mutually offsetting exertions of ad hoc diplomacy. Against the United States, legal restraints could only operate to the smaller partner's advantage. There was, moreover, nothing unseemly about submitting one's policy to judgment at the hands of other relatively similar countries. The members were more-or-less equals, and there were no manifest obstacles to objectivity.

The United States obviously did not fit this description, but the very conspicuous nature of that difference provided an equally good reason to cooperate. The United States had so much political and economic power in the early years that some objective restraint on its conduct (or at least the pretense thereof) was seen as a necessary base for amicable relations. GATT veterans recall more than one occasion in which United States actions were accompanied by claims that "We, too, will honor our obligations."

The growth of the EEC and the bloc of developing countries has converted GATT into an essentially tri-cornered body, with Japan rapidly carving out a fourth corner of its own. External relations have become relations between the larger entities.¹⁶⁷ Although the developing country bloc is not conspicuously less law-minded, the pivotal U.S.-EEC relationship is. The United States no longer needs the pretense of legal restraints *vis-à-vis* the EEC, and the EEC, a superpower in its own right, has less to fear from a more power-oriented diplomacy. Moreover, both superpowers now seem to find the prospect of outside restraints from "GATT" a bit incongruous. Part of the reaction is simply the natural consequence of being a superpower—a point which has been appreciated for many years by a large part of the U.S. Congress. But in addition, GATT itself no longer appears to be the same objective entity it

166. This statement might be challenged with regard to the United Kingdom's position, for the United Kingdom during this period had the appearance, if not the reality, of a major power. For whatever reason, however, the United Kingdom was one of the early pillars of GATT law—the only government, to the author's knowledge, ever to send a Cabinet Minister to Geneva just to demonstrate that it regarded its own delay in correcting a GATT violation as a very serious matter. See GATT Doc. CP.6/SR.7 (1951) (United Kingdom Purchase Tax, Appendix, Item B-3).

167. The developing countries maintain a formal caucus of their own, served by the GATT Secretariat and graced with its own document series. Although separate trade interests are still pursued individually, on larger issues developing country delegates generally represent the caucus. (The caucus is not the same thing as GATT's Trade and Development Committee; the latter is the formal working organ on development matters, attended by both sides.)

once was. Almost everyone is either an associate, present or prospective, of one of the superpowers themselves, or else a member of the developing country bloc which has declared an adversary position toward both superpowers, and independence from the very code of behavior the superpowers would want adjudicated.

It is difficult to say how deep-rooted these attitudes are. Drafting rules is an old GATT tradition, and the superpowers have continued to practice the tradition despite all the rhetoric to the contrary. The quite elaborate Antidumping Code of 1967 has been followed by demands for a similar instrument dealing with Countervailing Duties, and the possibility of other such agreements is currently being held out as part of the hoped-for nontariff barrier negotiations. The recent report of the President's Commission on International Trade and Investment Policy is another example, calling for new and more detailed GATT rules to cover export subsidies and government procurement.¹⁶⁸ As for the pragmatist rhetoric itself, it must be remembered that much of it rests on discontent with the substance of the existing rules, and that most government officials have not yet been forced to think about whether they would really do away with rules altogether. While I would not minimize the appeal of the pragmatist arguments, I believe that most officials, if confronted squarely with the issue in the course of a new Review Session, would be open to persuasion.

The political lethargy toward the revitalization of GATT rules has been aided, I think, by a certain inertia on the part of the GATT legalists. In contrast to their general appreciation of the need to make ad hoc compromises, those who defend the GATT legal system have generally resisted relaxing the GATT rules themselves. The reluctance is understandable. The present GATT, though far from perfect, represents a statement of rather high aspirations toward trade liberalization. A less ambitious GATT would no longer serve that authenticating function. In addition, there is some fear that a new GATT at this time would go too far in the other direction, legitimizing a degree of trade restriction even greater than that presently tolerated. More will be gained, it is argued, by continuing to invoke the higher standards, even when they obviously demand more than governments are prepared to give.

In its way, the legalist attachment to the old rules under these conditions is just as much a decision against the use of a substantive legal

168. See note 4 *supra*. On the proposals concerning countervailing duties and other nontariff barriers, see notes 54, 147-49 *supra*.

framework as is the pragmatist viewpoint. There is, of course, no way to prove that these tactics are wrong. Results are the ultimate test of either approach, and even afterward the result one obtains proves nothing about what might have been. It is my view, however, that the results attributable to the existence of the present substantive rules are becoming so thin that the risk of trying something else is becoming negligible.

IV. Proposals

The GATT will not be renegotiated unless the present superpower members are persuaded that a substantive code makes sense as a vehicle for their commercial diplomacy. In the first instance, persuasion will depend on whether officials agree with the general view argued in Part II. Ultimately, however, persuasion will also require the prospect of meaningful substantive rules and of an institutional structure that corresponds to the present political environment. This final part considers some of the specific issues that must be confronted in trying to meet this second condition.

On the question of developed country substantive rules, I have little to add to the discussion in Part III. I would merely offer two final observations on the conditions for negotiation. First, there is not much point in going forward unless the United States, the EEC, and Japan can agree on the basic outlines of a new code. The logical first step, therefore, would be discussions such as the United States-United Kingdom consultations which laid the groundwork for the GATT/ITO negotiations.

Second, governments must be prepared to accept two major limitations of the original substantive design. It should be recognized from the outset that agricultural trade will not be amenable to the same type of rules as those developed for industrial trade. While the United States and others will undoubtedly insist on some benefits to agricultural trade as a "price" for any larger agreement, ad hoc side agreements seem the only possible answer at the moment. Similarly, new rules on industrial trade will require a retreat from some of the specifics of the present code, for the present GATT consensus is (and in many cases always was) a good deal less ambitious than the rules themselves suggest. A good deal of work remains to be done in redefining that consensus. In particular, more attention needs to be given to the claims *against* liberal trade principles. It is too easy, and ultimately not very fruitful, to dismiss all such claims as unthinking mer-

cantilism. The government officials who respond favorably to these claims are more often than not relying on a variety of other values, seldom fully articulated, which persuade them that such claims are "fair." Even if one may disagree with the values being asserted, or with the relative weight they are given, one cannot draft rules accommodating them without first having a clear understanding of what they are.¹⁶⁹

The question of rules for the developing countries raises both substantive and structural issues. Jackson argues throughout his treatise for a concept of "federalism" with regard to GATT legal obligations.¹⁷⁰ I believe the concept itself would meet little resistance, for such diversity already exists with regard to the *de facto* status of developing countries in GATT, not to mention the *de jure* basis of Poland's membership.¹⁷¹ The question, however, is whether some other set of rules can in fact be formulated, rules meaningful enough to warrant participation in the same legal community.

For some years developing countries have been arguing that commercial reciprocity between rich and poor is guaranteed as things now stand because the desperate import needs of the poor countries compel them to spend every cent of export earnings on imports.¹⁷² Poland's membership in the GATT is based on a concept which is not very different from this argument, involving as it does a Polish commitment to a certain percentage increase in GATT country imports in return for MFN access to GATT markets. The obvious differences in internal economic structure notwithstanding, comparison of the two situations might be a fruitful place to start. The start will have to be made by the developing countries themselves, for the superpowers, far from being annoyed at developing country independence from the old code, might well prefer to leave things that way.

The reach and diversity of substantive obligations, in whatever form they emerge, will have to be reflected in the organizational structure of the institution that administers them. Ideas have been floated in the GATT corridors for some years suggesting that the part of GATT

169. For an example of the kind of arguments that have to be understood in these terms, see notes 140, 141 and 144 *supra*.

170. JACKSON, *supra* note 14, at 663-71, 183-85.

171. Poland's GATT membership is based on a Protocol which, although promising adherence to GATT rules generally, really rests on a multilateral purchase commitment. Protocol for the Accession of Poland to the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4331, T.I.A.S. No. 6430.

172. This was one of the main arguments advanced in support of GATT Article XXXVI:8, in the new Part IV, providing that developed countries do not expect reciprocity from developing countries in trade negotiations.

which still works, the rules governing trade between developed countries, would be better handled in the OECD, an organization consisting solely of Europe, Japan, and North America.¹⁷³ Professor Jackson recognizes the validity of the OECD urge, but tries to make room for it in a different fashion. Jackson would like to see an organization open to the world at large, but would separate membership from adherence to the code of legal obligations. The only conditions of membership would be a pledge to consult on trade controversies and to cooperate in trade information collection and analysis. The network of legal obligations would be a separate instrument, open to those who wish to join.¹⁷⁴

Jackson's approach seems preferable for the obvious reasons. The idea of separating functions, moreover, would seem to be adaptable to a variety of solutions encompassing more than one code.¹⁷⁵ The critical issue, however, will be the correspondence between obligation and participation under such a "federal" structure. A similar issue presented itself during the ITO negotiations, when it became clear that not all ITO members would participate in the early rounds of tariff reductions under GATT. The power to determine which countries would be entitled to the benefit of certain GATT obligations became a burning issue for much of the negotiations, and was only solved, late in the day, by a compromise which rested on the assumption that everyone was going to negotiate sooner or later.¹⁷⁶ Eventual uniformity of obligation will not be available as an answer this time.

Assuming a new code or codes and an institution which corresponds to them, the new rules will still not mean a great deal unless the institution is also capable of rendering judgments about the performance of its members under the code. Even though the real force behind such judgments will be the attitudes of the community as a whole, there must be an effective institution capable of mobilizing and legitimizing those attitudes. The present GATT Panel format appears increasingly unworkable. The supply of neutral countries suitable for superpower dispute settlement has decreased substantially, and the idea that individual representatives achieve such neutrality when acting

173. These attitudes antedate by many years the recent United States initiative in the OECD mentioned earlier, *supra* note 3.

174. JACKSON, *supra* note 14, at 780-85, 789-93.

175. Jackson himself does not suggest more than one code. The two-column code he proposes later, see p. 1372, *infra*, seems to have no "federalist" design to it, unless it is that federalism for developing countries means simply adopting fewer of the developed country rules.

176. ITO Charter, *supra* note 7, art. 17, para. 4 (b-e). See BROWN, *supra* note 9, at 74, 157-58.

in their "personal capacity" is not sufficiently convincing to outsiders.¹⁷⁷ Moreover, superpower sensitivity may well have increasing difficulty with the very idea of submitting disputes to smaller countries.

Jackson suggests two standing bodies, a Legal Panel and a Commercial Panel, staffed by what look like professional adjudicators and mediators.¹⁷⁸ I am dubious. GATT members have never had much taste for dispute settlement by professional outsiders, fearing, I think, a lack of understanding about the delicate mechanism that GATT law is. Assuming that GATT law will remain essentially what it has been, acceptance of a change along these lines is not too likely.

What is needed, I think, is an attempt to replicate, in a more permanent form, the rather remarkable GATT institution that was called Eric Wyndham-White. A close look at the workings of the Panel procedure will show that the prestige of the Secretariat has been the basic ingredient in the acceptance of GATT Panel decisions all along, mainly the prestige of Wyndham-White himself and of the two very able Deputies who served during his term.¹⁷⁹ The Secretariat's role was carefully concealed from the outside world for a while, but legal rulings of a general nature eventually fell to Wyndham-White himself,¹⁸⁰ and toward the end of his tenure EWW began to serve as chairman of some Panels. The one U.S.-EEC dispute actually sent to a Panel—the 1964 Chicken War decision—was essentially submission to Wyndham-White himself.¹⁸¹

177. In recent Senate hearings on EEC citrus preferences, the problem of neutrality received some attention with respect to the Article XXII working party's deadlock. *Hearings*, *supra* note 163, at 118, 123-24.

178. JACKSON, *supra* note 14, at 791-92.

179. In the early years, the Deputy Executive Secretary, Jean Royer, served as the secretary and staff director of all important dispute-settlement Panels or working parties, and usually drafted the decision. His successor, Finn Gundelach, did the same. Professor Dam is in error when he suggests that GATT Panel members have had to rely on their own national delegations for staff work. DAM, *supra* note 13, at 375. GATT Secretariat officials do almost all of the work.

The contribution of the two Deputies to the acceptance of the Panel process rested primarily on their technical command of the Agreement and on their skill at finding acceptable solutions for the difficulties which troubled most cases. *See generally* Hudec, *supra* note 33, at 644-59. Wyndham-White, in addition to his direct participation in some of the later cases and rulings, lent a measure of confidence to the entire process by virtue of the assurance his leadership gave that the Secretariat's action would be "sensible."

180. *E.g., Questions Relating to Bilateral Agreements, Discrimination and Variable Taxes*, GATT Doc. L/1636 (1961).

181. Appendix, Item A-26. The statement is made with no disrespect for the representatives of Switzerland, Sweden, Canada and Australia who sat on the Panel, all four of whom happened to be among the most distinguished of the GATT permanent representatives. Nevertheless, the author recalls that the agreement of the two parties to submit to a Panel was made solely on the assurance that EWW would chair it, the other members to be selected afterwards by indication of mutual preference from a list submitted by the Executive Secretary.

It must be said that the Chicken War case is not as convincing a demonstration of

The Wyndham-White Secretariat is gone, and the job it did has become a good deal more difficult in this era of increasing superpower sensitivity. To equip the new leadership to play the same role today, the GATT will have to pay considerably more attention to the Secretariat than it does now. Details such as regularizing the formal status of the Secretariat go without saying.¹⁸² The main requirement is that the major powers agree to the exercise of these adjudicatory functions by the Secretariat, and that they do what is necessary to maintain and to attract Secretariat officials of appropriate stature and experience. The officials themselves, of course, will have to win the respect needed to do the job. This time, however, the GATT cannot afford to wait for a decade while they earn the right to try.

A related issue which also deserves serious thought is the form in which the substantive rules of a new GATT might be cast. The traditional concept of legal obligation does not express very well the sort of diplomat's jurisprudence which GATT law was, and almost certainly will continue to be. The claims implied by the concept of legal obligation have made GATT law the target of much misinformed criticism, and the obvious impossibility of satisfying those claims has often served as a facile justification for ignoring rules altogether when they become inconvenient. As will have been evident by now, I am rather cautiously of the view that GATT rules might do as well or better in a form which rested more explicitly on their character as "norms" rather than as legal obligations.

Although I take the concept of "norms" directly from Jackson, I would propose to use that concept in a manner quite different from the proposal Jackson makes.¹⁸³ Jackson seems to be troubled mainly by the complexity of the present GATT code and by the difficulty of amending it due to the stringent voting requirements which reflect govern-

GATT power as it may appear. The dispute over the correct amount of retaliation was the sort in which neither party is plaintiff or defendant. See note 76 *supra*. Moreover, being that it was the eve of the Kennedy Round, both parties were extremely anxious to find a face-saving way out of the dispute, the substance of which (the actual amount of retaliation) had little or no real significance.

182. Since the GATT is technically a trade agreement and not an organization, it has no official place in the United Nations hierarchy. All these years, the housekeeping functions of the GATT and the status of its Secretariat as international civil servants have been taken care of by maintaining the fiction that the Interim Commission of the International Trade Organization (ICITO) still exists, and that it lends its Secretariat to the GATT Contracting Parties. It was not too long ago that even the garbage cans at the Villa Bogue were stenciled "GATT/ICITO." When M. Olivier Long was appointed to replace EWW, the ICITO governments called the first meeting of the ICITO since November, 1950, to regularize Long's appointment by making him Executive Secretary of ICITO. U.N. Doc. ICITO 1/36 (1968).

183. JACKSON, *supra* note 14, at 784-85.

mental caution about legal obligation. Jackson proposes, therefore, a double-column substantive code, a "Mandatory" column containing those obligations governments deem essential, and a "Norms" column containing the rules governments would like to see applied to the remaining subjects. The Mandatory column, hopefully as short as possible, would be made legally binding immediately. The Norms column would be authenticated, but would become legally binding only when adopted by individual governments as and when they became ready to do so. Underlying the scheme is the thought that amendment of mere "norms" would be easier, that the substance of the rules would be less crippled by compromise, and that "legal obligation" would be taken much more seriously if it were reserved for rules meant to be complied with. Jackson warns that the proposal is but a model for a distant era.

Much as I agree with Jackson's perception of the need to amend GATT and of the difficulties posed by the notion of "legal obligation" in this regard, I believe that his proposals move in the wrong direction. Jackson's focus on legal obligation as the end product passes over the considerable potential of "norms" as a regulatory device in themselves. Jackson's "Norms" column is really a lot closer to what GATT law has in fact been, and was intended to be. Although I share Jackson's preference for moving to a more effective legal structure, I believe the more limited ambitions of the 1947 design are still the only ones that can hope to be achieved in the foreseeable future. Consequently, I think the architects of the new GATT would be better advised to try to get the old machine running again.¹⁸⁴

I would suggest that GATT rules continue to be the single column code they have always been, their substance reflecting, as before, the behavior governments realistically hope to achieve under the somewhat optimistic forecasts rule-making always seems to induce. Rather than trying to construct a more potent form of legal obligation, I would recommend removing their "binding" character altogether.¹⁸⁵ The rules could, instead, be framed as written standards of "nullification-and-impairment," a concept which would include (1) the right to

184. Even if one were to accept the basic direction of Jackson's proposal, there would still be a substantial practical question. Rules on trade policy do not divide very easily into more important and less important, for one kind of restriction can stop trade just about as well as another. If, therefore, the difference between "Obligation" and "Norm" really made a difference to governments, it is very likely that they would insist on treating all the rules as a single unit.

185. One is led to wonder whether a similar thought might not underlie some of the apparent inconsistencies in Professor Dam's treatment of Article XXIV, pp. 1332-33 *supra*. Substantive "rules" take quite a beating, but "standards" seem to be a different matter.

ask for a third-party ruling on whether a particular measure conforms to applicable norms, and (2) the right to treat transgression of a norm as "nullification and impairment"—that is, the right to secure a polite Recommendation addressed to the offending party, and the right to redress the balance of concessions if the transgression itself is not cured.¹⁸⁶

I believe this change in form would remove none of the actual force behind GATT law as it has operated in the past. I can see no difference at all as far as GATT procedures themselves are concerned, for the early GATT's disregard for legal form has continued to be a conspicuous feature of present day GATT practice as well.¹⁸⁷ Moreover, I

186. For a discussion of the concept of nullification and impairment with regard to practices not involving a breach of legal obligation, see pp. 1340-42 *supra*.

I know of only one case in which the GATT has actually promulgated a written nullification and impairment standard. In 1954, the Contracting Parties decided that the grant of a domestic production subsidy on a product that had previously been the subject of a tariff concession could not reasonably be anticipated by the party receiving the concession. GATT, 3d Supp. BISD 224 (1955).

In theory, there should be no difference under present GATT law between the measure of compensation retaliation with or without a legal violation. See TAN 33 *supra*. Since retaliation is primarily symbolic anyhow, see note 48 *supra*, there would be no practical difference either. The possibility of allowing discriminatory retaliation in the case of a legal violation, e.g., Appendix, Item A-10, would probably not be admitted under the present theory of nonviolation nullification and impairment. If that issue were really considered to be important, I see no reason why a GATT code along the lines I suggest could not make an exception for discriminatory "compensation" in cases where MFN action were deemed by the Contracting Parties to be ineffective. But the more likely answer would be that, given the almost universal tendency to adjust such matters by either remedial action or positive compensation, the issue is not important enough to worry about.

Probably the most important technical matter would be the necessary adjustments of domestic law to assure that the consequences of the GATT's present legal status upon domestic law would not be lost upon the transition. As a general matter, I believe that the political conditions necessary to such a renegotiation in the first place would almost necessarily be sufficient to provide what consequential changes might be necessary. The exceptional case would be the situation of divided authority, such as in the United States, where either constitutional authority or prior legislation authorize the executive to give GATT legal obligations domestic effect without recourse to the legislature. Thus, for example, United States tariff rates after the Kennedy Round (as well as all earlier trade agreement negotiations) are in force by virtue of Presidential Proclamations which rest on legislative authority of semi-permanent character authorizing the President to proclaim rates necessary and appropriate to carry out trade agreements. 19 U.S.C. § 1801 (1964). Should it be determined that such law requires binding legal obligations, hardly a foregone conclusion, the proposal I have made would require a minor Congressional amendment putting such concession rates on a different footing. The risk here is less that Congress would try to turn back the clock on tariffs than that such legislation would invite a disastrous review and rejection of any new agreement as a whole. This is a risk.

187. GATT rights are routinely accorded on a "de facto" basis to new nations which have not yet determined their policy vis-à-vis GATT. JACKSON, *supra* note 14, at 97. Part IV of GATT has been acted upon for several years on the basis of a declaration of de facto application, expressly nonbinding. GATT, 13th Supp. BISD 10 (1965); see *id.* at 16th Supp., 8-9 (1968). Among the developed countries alone, GATT Article XVI:4 was treated as operative for several years before it actually came into force according to its terms. Indeed, just shortly after the negotiators had agreed on a text and long before formal ratification was even possible, the Danish government brought a formal complaint against the United Kingdom based on the new text, explaining that since the new text represented the position of both governments there was no reason not to use it. Not only

would argue that the GATT's impact on national decision-making would be substantially the same. As I have tried to demonstrate in Part II, the principal function GATT rules serve at present is normative—whether in persuading certain officials that the GATT viewpoint is right or in persuading other officials and outsiders that various actions and decisions on behalf of such standards are at least a legitimate response. While it may be argued that the words “legal obligation” make it easier for outsiders to understand the reasons for complying with GATT norms, I believe the response to something like “agreed standards of good behavior” would not be significantly different. The gains, on the other hand, would be significant. In addition to a more realistic attitude toward amendment, I believe such a change would also make it more difficult to dismiss GATT “law” as utopian, and thus, over the long run, would actually focus greater attention—of the kind that matters—on the rules themselves.

A final word is necessary concerning the kind of rules that ought to be written. One of Professor Dam's most appealing arguments is his contention that GATT rules should be framed in terms of the real trade effects rather than in terms of mechanical criteria. This is the burden of his argument about GATT Article XXIV, for example—the preference for a rule requiring net trade “creation” rather than rules concerned with the level of external tariffs or the degree of internal liberalization.¹⁸⁸ The same point is made elsewhere: GATT Panel decisions, Dam argues, have generally been “superficial” because they do not develop enough economic information.¹⁸⁹ The GATT rules relating to retaliation do not focus on the real trade effects of the measure in question.¹⁹⁰ The Border Taxes issue should be settled by a rule which requires no trade diversion.¹⁹¹

One cannot quarrel with Professor Dam's general disposition to re-examine the economic foundations of GATT rules, nor his insistence that officials understand the economic impact of the standards they employ. As to writing the GATT rules themselves in terms of these criteria, however, I would merely repeat the warning made in Part II

did the United Kingdom accept the proposition, but a Panel was actually appointed to adjudicate the dispute. *See* Appendix, Item B-28. On the history of Article XVI:4 generally, *see* JACKSON, *supra* note 14, at 371-76.

For a discussion of the early GATT's attitude toward legal obligations *per se*, *see* pp. 1340-42 *supra*.

188. *See* p. 1333 *supra*.

189. DAM, *supra* note 13, at 374-75.

190. *Id.* at 374. *See also id.* at 58-60. For a specific criticism of this view, *see* note 69 *supra*.

191. DAM, *supra* note 13, at 217-21.

about the difficulties of undertaking detailed economic analysis in particular controversies. I would also urge that a careful examination be made of the prior GATT experience in this regard. In one of its first legal controversies, the GATT confronted a proposal that trade damage must be found before declaring any measure in violation of the Agreement. The argument was rejected then,¹⁰² and that decision has been reaffirmed on at least two subsequent occasions.¹⁰³ Although the

192. 2 GATT, BISD 181, 184 (1949) (Brazilian Internal Taxes, Appendix, Item A-7).

193. The two early cases involving this issue are perhaps doubly significant, because both involved nonviolation nullification and impairment. In both cases, the defendants argued strenuously that there was no trade damage, and that consequently, especially in the absence of a legal violation, nullification would not lie. Even here, however, the Contracting Parties rejected the arguments, finding nullification on the basis of the practice and its likely effects.

The first was the Australian Subsidy case, Appendix, Item A-8. Australia raised the trade damage defense in the initial plenary discussion of the case, several other contracting parties concurred as to the importance of the issue, and Australia eventually agreed to submit the case to a working party on the understanding that trade damage would be considered. GATT Doc. CP.4/SR.15 (1950). The first draft of the working party report shows that the working party wrestled with the issue and could come to no conclusion. GATT Doc. CP.4/G/2 (1950). The final text of the report was redrafted, quite artfully, to avoid the issue by finding that there was nullification in any event and that the trade damage issue was not relevant in the absence of a request for authority to retaliate. 2 GATT, BISD 188, 193-94 (1950). This fact was noted by one delegation when the Contracting Parties reviewed the report, but despite that party's objection (Australia itself remained silent), the decision was approved. GATT Doc. CP.4/SR.21 (1950).

The issue was reproduced almost exactly in the Sardines case, Appendix, Item A-11, but this time the Panel expressly concluded that an actual finding of trade damage was not necessary to a finding of nullification. GATT, 1st Supp. BISD 53, 56 (1952).

The third case, somewhat more confusing, was the 1962 proceeding brought by Uruguay against fifteen developed countries, Appendix, Item A-24. Many of the defendants offered proof of no trade damage as to many restrictions. Uruguay submitted no evidence of trade damage at all. The Panel treated all legal violations as having been established, without even mentioning the trade damage issue. On the other hand, it limited itself to comments on the literally hundreds of other restrictions involved, stating it could not consider nullification without some more specific indication from Uruguay as to the nature of the nullification—a request which Uruguay, preferring to argue only the grand sweep of all the restrictions together, chose not to meet.

Generally speaking, GATT tribunals have not had much success with the trade damage issue. The very first GATT Panel found itself stymied over such a question. Appendix, Item A-4. The first two nullification and impairment cases cited above had no greater success. Most GATT Panels in the past have established what facts were necessary by negotiation, sometimes screening factual concessions by one party by pretending to have made the decision themselves.

Neither of the cases in which GATT has reviewed retaliatory measures prove very much. The decision reviewing the Netherlands' retaliation against United States dairy product restrictions, Appendix, Item A-10, appeared to make its own judgment on a figure somewhere between the initial demands of both parties, but in fact the figure was one worked out privately between the parties. The Panel decision in the United States-EEC Chicken War dispute, *id.* at Item A-26, produced a genuine ruling, by the Panel. But two factors have to be noted: (1) both the United States and the EEC were seeking a way out of an impasse neither wanted, *see note 181 supra*; and (2) the dispute involved the almost academic question of the amount of trade that would have occurred during a specific one year period over two years in the past, making it possible to assemble at least superficially plausible data from comparable markets in support of the decision.

To be fair, however, mention should be made of the two special panel decisions rendered under the United Kingdom Article I waivers, note 86 *supra*. The terms of the waiver

“trade damage” standard has been revived in a number of present-day controversies, particularly in defense of the EEC’s many “association” agreements, I have yet to hear any of the participants claiming that the rebirth of this standard has contributed to the GATT’s regulatory effectiveness. Indeed, the overwhelming sentiment seems to be exactly to the contrary.

V. Conclusion

Strictly speaking, the current choice is not GATT *or* GABB. The present world of international trade policy is quite different than the world which existed in 1947. In some areas, the conditions which permitted successful implementation of the original GATT design may have disappeared entirely. In many other areas, conditions are at best uncertain. It is quite possible, therefore, that GABB may turn out to be the only realistic answer in many parts of GATT’s original domain. Before any such choice is made, however, it is critically important that the real choice be understood.

I have argued that despite its many current failings the GATT’s basic legal design is sound and is worth trying to save wherever conditions permit. I have also tried to make clear, however, that preservation of that design will require a fairly bold initiative, for both the substance of the existing rules and the legal framework for applying them urgently need to be brought up to date. On balance, I believe the existing consensus on international trade policy is sufficient to make that effort worthwhile.

The current crisis over United States trade and monetary policy presents an obvious threat to GATT reform—but it also presents a significant opportunity. The threat, of course, is that the crisis will get out of hand and will rupture the very fabric of international cooperation on which *both* GATT and GABB depend. But this same crisis could also furnish the sort of shock that is needed to open the door to consideration of the major structural changes GATT requires. Governments are certainly aware of the threat. One hopes they will also recognize the opportunity.

required a decision as to whether an increase in the margin of discrimination under the Commonwealth Preference would divert trade. Both decisions made the necessary rulings, Appendix, Items A-21, A-26. Despite an express reservation by the losing party in the first case, GATT Doc. L/1059 (1959), it must be said that both decisions did succeed in applying the test.

APPENDIX

THE GATT COMPLAINTS PROCEDURE 1948-1970

This Appendix presents a compilation of cases handled by the GATT complaints procedure up to January 1, 1970. I have selected for inclusion only those controversies which have been framed in the manner of an Article XXIII:2 lawsuit—that is, a proceeding (1) initiated by one or more GATT members, (2) based on a claim that practices of another member or members affect GATT legal rights, and (3) looking toward an eventual “decision” of some sort by GATT in vindication of those rights. These criteria exclude several typical kinds of GATT legal controversy: first, the more or less automatic legal review procedures under GATT Articles XII, XVIII, and XXIV; second, proceedings in which a government volunteers to undertake the normal review and consultation procedure;^a and finally, requests for legal rulings of a general nature which, although usually aimed at some specific practice, confess by their indirection a reluctance to press the issue to a conclusion.^b

I have divided the cases into two categories. Part A lists those cases in which the GATT or a GATT tribunal either (1) ruled on the merits of a dispute,^c or (2) fashioned a settlement acceptable to the

(a) See, e.g., the consultations cited in appendix note (d), *infra*.

(b) See, e.g., the United States request for clarification regarding the application of GATT Art. IV to trade in television programs, L/1615 (1961).

(c) In theory, the only entity capable of rendering legal rulings is the CONTRACTING PARTIES, the plenary assembly of all GATT members. See DAM, *supra* note 13, at 364-66. In practice, decisions by GATT Panels and working parties have come to be treated as authoritative in themselves, and formal adoption by the CONTRACTING PARTIES has become a formality. In Part A I have chosen to indicate the actual decision-making body. With the exception of Items 17 and 20, where there was a real dispute, Items 21, 25, and 26, which were special proceedings not requiring ratification, and Item 2, where the *de facto* ratification was never formalized, all the decisions listed were ratified by the CONTRACTING PARTIES.

parties in the context of a formal report analyzing (and often resolving) some or all of the legal issues in dispute. Part B lists those "complaints" which appeared to be the first step toward an A-type decision, but which were settled or otherwise disposed of. Variations in GATT practice have required the exercise of some discretion in order to present an accurate list of the Part B cases. Thus, I have included several early cases (export subsidies before 1955) which were treated like other complaints even though they did not involve legal rights. I have also included several post-1962 controversies which fit the "complaints" model in every respect except that since 1962 GATT practice has virtually excluded the possibility of pressing any of these complaints to a formal ruling on the merits. Conversely, I have excluded a few post-1960 consultations which, although sometimes classified as "conciliation" in the BISD indexes, were really more in the nature of a broad Article XII review.⁴

Unless otherwise indicated, all citations below are to GATT documents or publications. Notations marked with an asterisk are based on the author's personal knowledge, the relevant documents not being available at this time.

(d) GATT terminology has bounced back and forth between "complaints" and "conciliation" as a description for the settlement-of-disputes process, coming to rest on the latter term in recent years. Both the relative softness of the latter term and the absence of any more rigorous complaints procedure has led GATT indexers to include some rather broad and fuzzy consultations within that term. Thus the consultations over the United Kingdom Surcharge, *see* 15th Supp. BISD 113 (1966), were so classified, *id.*, at iv, but then were later omitted from a more comprehensive index, *see* 16th Supp. BISD 131. Virtually identical consultations over Canadian Surcharges and emergency French Trade Measures were not, however, classified as "conciliation." *See* 11th Supp. BISD, at 6, 57 (1962); 16th Supp. BISD, at v, 57, 65 (1968).

A. COMPLAINTS DECIDED

Subject	Complainant ^e	Decision ^f	Result ^g
1. Cuban Consular Taxes	Netherlands	Chairman's Ruling, 2 BISD 12 (1948)	Practice terminated, CP./4 (1948)
2. Indian Tax Rebates	Pakistan	Chairman's Ruling, 2 BISD 12 (1948)	Practice terminated in broader settlement, ^h CP.3/SR.19 (1949)
3. Cuban Restrictions on Textile Imports (I)	United States	Settlement recommended by working party, CP.2/43 (1948)	Settlement accepted, <i>see</i> CP.3/SR.42 (1949).
4. Cuban Restrictions on Textile Imports (II)	United States	Working party/panel unable to resolve, CP.3/82 (1949)	
5. U.S. Export Restrictions	Czechoslovakia	Ruling by Contracting Parties, 2 BISD 28 (1949)	No violation ⁱ
6. U.S. Tariff Preferences to Cuba	Cuba	Ruling by Contracting Parties, 2 BISD 11 (1949)	No violation ^j
7. Brazilian Internal Taxes	France	<i>De facto</i> rulings by working party, ^k 2 BISD 181, 186 (1949, 1950)	Practice eventually terminated, 7th Supp. BISD 68 (1958)

(e) Complaints have frequently stimulated other governments to express an interest in the matter and to join, in varying degrees, as a plaintiff. Except for cases of actual joint participation, I have listed only the initial actor.

(f) *See* note (c) *supra*. Citations are to the most formal publication in which the decision itself appears.

(g) Citations are to best available primary source stating the outcome.

(h) India refused to accept the ruling as binding, but removed the measure nonetheless. CP.3/6 (1949). On the curious legal history of this ruling, *see* note 87 *supra*.

(i) Czechoslovakia refused to accept the ruling as binding, CP.3/SR.22 (1949). Belgium did not contest the ruling, but did exercise its right under Art. XIX to withdraw concessions of its own in retaliation, rather than accepting compensation in the form of other United States tariff concessions. L/9 (1952).

(j) Cuba refused to accept the ruling as binding, and, in protest, left GATT for over a year. CP.3/SR.38 (1949).
(k) The 1949 report listed divided views on all the legal issues, the three major complainants being in the majority in all but one instance. Although working party reports of this kind are never looked upon as "decisions" or "rulings," the Contracting Parties in fact so treated the view of the complainants in this report; when a slightly different working party reconvened to review corrective legislation, it referred to "the conclusions reached in previous discussions by the CONTRACTING PARTIES," 2 BISD at 186 (emphasis added), and proceeded to review the legislation in light of the complainants' conclusions. The complainants, incidentally, were France, the United Kingdom, and the United States.

Subject	Complainant	Decision	Result
8. Australian Subsidy on Ammonium Sulphate	Chile	Ruling by working party 2 BISD 188 (1950)	Settled, practice adjusted, CP.5/SR.6 (1950)
9. U.S. Escape Clause Action on Fur Felt Hat Bodies	Czechoslovakia	Ruling by working party Sales No. GATT/1951-31	No violation
10. Netherlands Article XXIII Action	United States	Ruling by working party, 1st Supp. BISD 62 (1952)	Ruling followed, m SR.7/16 (1952)
11. German Duties on Sardines	Norway	Ruling by Panel, 1st Supp. BISD 53 (1952)	Settled, duty reduced, G/52/Add.1 (1953)
12. Greek Special Import Taxes	France	Partial ruling by Panel, final decision deferred	Taxes terminated, SR.8/7 (1953)
13. Greek Increase in Bound Duty	United Kingdom	1st Supp. BISD 48 (1952)	
		Settlement recommended by Panel, 1st Supp. BISD 51 (1952)	Increase terminated, SR.8/7 (1953)
14. Belgian Family Allowances ⁿ	Norway & Denmark	Ruling by Panel, 1st Supp. BISD 59 (1952)	Practice terminated, GATT, INT'L TRADE 1954, at 133
15. German Duties on Starch	Belux	Settlement effected by Panel, 3d Supp. BISD 77 (1955)	No report, settlement presum- ably carried out.
16. Swedish Antidumping Duties	Italy	Ruling by Panel, 3d Supp. BISD 81 (1955)	Practice terminated, SR.10/3 (1955)

(l) Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT, Geneva, Nov. 1951 (Sales No. GATT/1951-3).

(m) For the underlying dispute, see Part B, Item 4. The retaliation was withdrawn in 1959, SR.15/7. For a discussion of the actual implementation of the retaliation, see note 48, *supra*.

(n) For a discussion of the case, see Hudec, *supra* note 33, at 696-65 (1970).

Subject	Complainant	Decision	Result
17. Greek Duties on LP Records	West Germany	Ruling by Group of Experts, L/580 (1956)	Ruling not accepted. ^o SR.11/16 (1956); compromise settlement, L/765 (1957)
18. Italian Subsidy on Agricultural Machinery	United Kingdom	Ruling by Panel, 7th Supp. BISD 60 (1958)	Settled. ^p SR.13/18 (1958)
19. French Export Subsidy on Wheat Flour	Australia	Ruling by Panel, 7th Supp. BISD 46 (1958)	Settled by price change, L/1323 (1960)
20. German Agricultural Marketing Laws	Several countries, led by United States	Conclusions by "most members" of working party, L/821 (1958); Recommendation by Intersectoral Committee, L/817 (1958)	Ruling not accepted but compromise waiver with undertakings worked out "without prejudice" to legal issues, 8th Supp. BISD 31 (1959) ^q
21. U.K. Preference on Ornamental Pottery	West Germany	Ruling by Special Panel, SECRET/105 (1959)	No violation
22. French Quantitative Restrictions	United States	Ruling by Panel, 11th Supp. BISD 94 (1962)	Settled. ^r
23. Canadian Antidumping Duties on Potatoes	United States	Ruling by Panel, 11th Supp. BISD 88 (1962)	Practice terminated. ^s

(o) Several developing country delegations objected to the ruling, and the matter was never brought to a vote.

(p) The settlement was to allow the existing subsidy law to expire. It appears to have broken down in late 1960. See L/1294 (1960). There is no record of any subsequent action.

(q) For a discussion of the case, see G. Curzon, MULTILATERAL COMMERCIAL DIPLOMACY 146-55 (1965).

(r) Some existing restrictions were removed or relaxed. See *Hearings on Tariff and Trade Proposal Before the House Ways and Means Comm.*, 90th Cong., 2d Sess. at 610, 615 (1968).

(s) See *id.* at 613.

Subject	Complainant	Decision	Result
24. Uruguayan Recourse to Article XXIII	Uruguay ^t	Rulings by Panel, 11th Supp. BISD 95 (1962) 13th Supp. BISD 85 (1963) 13th Supp. BISD 45 (1964)	"Some progress," SR-24/10 (1967)
25. U.K. Preferences on Bananas	Brazil	Ruling by Special Panel*	Ruling followed*
26. U.S. Action under Article XXVIII ("Chicken War") ^u	Joint U.S.-EEC sub-mission	Ruling by Special Panel, Press Release GATT/819 (1963)	Ruling followed, 12th Supp. BISD (1963)

B. COMPLAINTS OTHERWISE DISPOSED OF

Subject	Complainant	Complaint	Disposition
1. French Export Restrictions on Hides and Skins	United States	CP.5/1 (1950)	Complaint withdrawn after clarification, CP.5/27 (1950)
2. French and U.K. Quantitative Restrictions	Belgium	CP.5/1 (1950)	Settled, CP.5/SR.25 (1950)
3. U.K. Purchase Tax	Netherlands	CP.5/12 (1950)	Practice terminated, G/18 (1952)
4. U.S. Restrictions on Dairy Imports	Netherlands & Denmark	CP.6/26-28 (1951)	Violation admitted, covered by waiver, see 3d Supp. BISD 141 (1955). ^v

(i) The Uruguayan complaint covered 15 countries and over 500 alleged trade restrictions. The latter two Panel reports record some of the progress, but after a while everyone lost count.
(u) Described at length in CHAYES ET AL., *supra* note 58, at 249; J. EVANS, *supra* note 3, at 178.
(v) The Netherlands retaliated. See Part A, Item 10, *supra*. The United States had relaxed the restrictions somewhat in response to the complaint, L/19, L/19/Add.1 (1952), but not enough to meet the complaint.

Subject	Complainant	Complaint	Disposition
5. Belgian Restrictions on Dollar Imports	United States	IC/7 (1952) ^w	Practice terminated, SR.9/2 (1954)
6. Pakistani Export Fees	India	L/41 (1952)	Settled, L/82/Add.2 (1953)
7. U.S. Export Subsidy on Sultanas	Greece	L/39 (1952)	Impasse, complaint withdrawn, SR.8/12; Press Release GATT/137 (1954)
8. U.S. Escape Clause Action on Dried Figs	Greece & Turkey	L/40, L/44 (1952)	Settled, x SR.9/40 (1955)
9. French Statistical Tax	United States	L/64 (1952)	Tax terminated, SR.9/28 (1955)
10. U.S. Export Subsidy on Oranges	Italy	L/122 (1953)	Settled, SR.10/3 (1955)
11. U.S. Restrictions on Imports of Filberts	Turkey	G/46/Add.3 (1953)	Restrictions terminated, SR.8/12 (1953)
12. Brazilian Compensatory Concessions	United States	IC/W/20 (1953)	Concessions implemented, SR.9/27 (1954)
13. French Special Tax	Italy	L/213 (1954)	Replaced by general devaluation, 7th Supp. BISD 68 (1959)
14. Greek Luxury Tax	Italy	L/234 (1954)	Settled, SR.9/30 (1955)
15. Turkish Import Levy	Italy	L/214 (1954)	Impasse, complaint withdrawn, SR.9/40 (1955)
16. Belgian Restrictions on Imports of Coal	United States	L/258 (1954)	Settled, SR.9/42 (1955)
17. German Restrictions on Imports of Coal	United States	L/242 (1954)	Settled, SR.10/1 (1955)

(w) A working party was appointed to examine the legal issues, IC/SR.3 (1952), but never did so.

(x) Turkey finally chose to retaliate rather than to accept compensation. L/57 (1952).

Subject	Complainant	Complaint	Disposition
18. Peruvian Embargo on Imports from Czechoslovakia	Czechoslovakia	L/285 (1954)	Embargo terminated, SR.9/27 (1954)
19. French Stamp Tax	United States	L/410 (1955)	Tax eventually corrected, L/1412 (1961)
20. Italian Turnover Tax	United Kingdom	L/421 (1955)	Settled, SR.10/19 (1955)
21. U.S. (Hawaiian) Regulations on Sale of Imported Eggs	Australia	L/411 (1955)	Regulation terminated, Territory v. Ho, 41 Hawaii 505 (1957)
22. Italian Duties on Cheese	Denmark	L/417/Add.1 (1955)	Settled, SR.10/20 (1955)
23. Italian Duties on Cotton	Greece	L/449 (1955)	Complaint withdrawn pending consultation, SR.10/18 (1955)
24. French Auto Taxes	United States	L/520 (1956)	Impasse, ^y SR.11/16 (1956)
25. Chilean Auto Taxes	United States	L/599 (1956)	Settled, IC/SR.31 (1957)
26. German Turnover Tax	Netherlands	L/562 (1956)	Complaint withdrawn pending consultation, SR.11/16 (1956)
27. U.S. Export Subsidy on Poultry	Denmark	L/586 (1956)	Complaint withdrawn pending consultation, SR.11/16 (1956)
28. U.K. Subsidy on Eggs	Denmark	L/627 (1957) =	Settled, IC/SR.34 (1957)
29. French Subsidy on Agricultural Ma-	United Kingdom	L/695 (1957)	Practice corrected, ^z SR.13/7 (1958)
30. Greek Credit Facilities	West Germany	IC/SR.34 (1957)	Complaint withdrawn pending consultation, L/740 (1957)

(y) A negotiated settlement was worked out as part of the Kennedy Round side-agreement concerning chemicals, as yet not implemented due to inaction by the United States. See Agreement Relating Principally to Chemicals, Art. 7, in 5 GATT, LEGAL INSTRUMENTS EMBODYING THE RESULTS OF THE 1964-67 TRADE CONFERENCE 3992-97, 98 (1967).

(z) A Panel was appointed to examine the legal issues, IC/SR.31 (1957), but never met.

(2)' The legal issues were referred to a Panel already considering a companion case involving Italian subsidies, Part A, Item 18 *supra*, but the case was settled before the Panel was actually asked to consider the case. See SR.12/19 (1957).

Subject	Complainant	Complaint	Disposition
31. U.S. Escape Clause Action on Spring Clothings	Denmark & Sweden	L/758 (1957)	Impasse, IC/SR.38 (1958)
32. Italian Export Subsidy on Wheat Flour	Australia	L/853 (1958)	Settled, ^z See GATT, INT'L TRADE (1959).
33. Italian Regulations on Purchase of Ship Plates	Austria	L/875 (1958)	Regulation terminated, SR.18/4 (1961)
34. Italian Quantitative Restrictions	United States	See L/1871 (1962).	Settled, SR.20/8 (1962)
35. U.S. Export Subsidy on Manufactured Tobacco	Malawi	L/2856 (1967)	Impasse, SR.24/13 (1967)
36. U.K. Rebate System on Steel Purchases	United States	See SR.24/13 (1967).	Practice terminated, L/3350 (1970)
37. Spanish Import Restrictions on Cod	Denmark	L/3221 (1969)	Settled*
38. Italian Administrative & Statistical Fees	United States	L/3279 (1969)	Settled, L/3350 (1970)
39. EEC Arrangement on Citrus Products	United States	See note 163 <i>supra</i> .	Pending*

(z)" The complaint was part of a campaign by the Australian government protesting the disruption of Asian markets by subsidized sales from several European countries. See Part A, Item 19 (France); GATT, INT'L TRADE 1959, at 90n.1 (Germany). French and Italian exports of wheat flour to Asia fell substantially in 1959 owing to higher export prices, the higher prices presumably being the settlement made to meet the Austrian complaint. *Id.*

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